

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 15, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (“MSHA”),	:	Docket No. KENT 2010-160
	:	
Petitioner,	:	A.C. No. 15-08079-198829-02
	:	
v.	:	
	:	Mine ID: 15-08079
EXCEL MINING, LLC,	:	Mine: No. 3
	:	
Respondent.	:	

DECISION

Appearances: LaTasha Thomas, Esq., Office of the Solicitor, U.S. Department of Labor,
Nashville, Tennessee for Petitioner

Gary D. McCollum, Esq., Alliance Coal, LLC, Lexington, Kentucky for
Respondent

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA¹

On November 24, 2009, the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), filed a Petition for the Assessment of Civil Penalty (“Petition”) against Excel Mining, LLC (“Respondent” or “Excel”), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), as amended, 30 U.S.C. §§ 815, 820 (2006). Respondent subsequently filed an Answer to Petition for the Assessment of Civil Penalty (“Answer”) on December 15, 2009. By Order of Robert J. Lesnick, Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission (“Commission”), dated December 1, 2010, the case was assigned to the undersigned for adjudication.

¹ The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the Federal Mine Safety and Health Review Commission pursuant to an Inter-Agency Agreement effective for a period beginning September 2, 2010.

The Petition alleges six violations described in Citation Numbers 8231582, 8231583, 8231586, 8236506, 8236514 and 8236515, each of which were issued pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), and for which the Secretary seeks penalties totaling \$13,572. In particular, Citation Number 8231582 alleges a violation of 30 C.F.R. § 75.370(a)(1) for failure to comply with an approved ventilation plan. Citation Number 8231583 alleges a violation of 30 C.F.R. § 75.362(a)(2) for failure to conduct an adequate onshift examination. Citation Number 8231586 alleges a violation of 30 C.F.R. § 75.503 for failure to maintain a roof bolter machine in permissible condition. Citation Number 8236506 alleges a violation of 30 C.F.R. § 75.400 for allowing accumulations of combustible materials to exist in an active working section. Citation Number 8236514 alleges a violation of 30 C.F.R. § 75.503 for failure to maintain a continuous miner machine in permissible condition. Finally, Citation Number 8236515 alleges a violation 30 C.F.R. § 75.370(a)(1) for failure to comply with an approved ventilation plan.

A hearing was held on the charged violations in Pikeville, Kentucky on October 18 and 19, 2011. At the hearing, the Secretary introduced the testimony of one witness, Billy Ray Meddings, and proffered nine exhibits that were admitted into evidence and marked as the Secretary's Exhibits ("S's Ex.") 1-9. Respondent stipulated to these exhibits at the hearing. Transcript ("Tr.") 192. Respondent, in turn, introduced the testimony of three witnesses, Jimmy Lindell Rowe, Keith Stevens, and Ronnie Johnson. The Secretary and Respondent subsequently filed post-hearing briefs on January 9, 2012, and February 6, 2012, respectively. With the latter filing, the record closed.

I. STIPULATIONS

Before the hearing, the parties entered into the following stipulations ("Stip"):

1. Respondent is subject to the Mine Act.
2. Respondent has an effect upon interstate commerce within the meaning of the Mine Act.
3. Respondent is subject to the jurisdiction of the Commission, and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.
4. Respondent operates the No. 3 Mine, I.D. No. 15-08079.
5. The No. 3 Mine produced 1,789,927 tons of coal in 2008, and had 655,991 hours worked in 2008.
6. A reasonable penalty will not affect Respondent's ability to remain in business.

II. BURDEN OF PROOF

In a civil penalty proceeding, the Secretary bears the burden of proving the alleged violation by a preponderance of the evidence. *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989) (citing 30 U.S.C. § 823(d)(2); *Kenny Richardson*, 3 FMSHRC 8, 12 n.7 (Jan. 1981)). This standard requires the Secretary to demonstrate that "the existence of a fact is more probable

than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

III. PENALTY PRINCIPLES

To determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to consider the following factors: (1) the operator’s history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator’s ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). Set forth at 30 C.F.R. § 100.3, MSHA promulgated regulations that elaborate upon these factors in order to facilitate the calculation of a civil penalty to propose for charged violations. The undersigned is not bound by these regulations or the penalty proposed by the Secretary, however. 29 C.F.R. § 2700.30(b); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291–92 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Rather, the undersigned is required to determine the appropriate assessment independently by proper consideration of the six penalty criteria identified above. *Id.*

The concepts of gravity and negligence are applicable to all citations and orders issued pursuant to the Mine Act, and form part of the penalty assessment scheme used by MSHA and its inspectors. For certain violations found to be “significant and substantial” or to involve “unwarrantable failure,” enhanced enforcement mechanisms are available under Section 104(d)(1) of the Act, which provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1). As the Commission succinctly explained in a recent decision, “Section 104(d)(1) distinguishes as more serious any violation that ‘could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard,’ and establishes more

severe sanctions for any violation that is caused by ‘an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.’” *Wolf Run Mining Co.*, 2013 WL 1249150, *2 n.4 (Mar. 20, 2013) (alteration in original). This mechanism for enhanced enforcement serves as a “forceful incentive for the operator to exercise special vigilance in health and safety matters.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2000 (Dec. 1987) (citing *Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (Sept. 1987)). The legal standards applicable to each of these concepts are described below.

A. GRAVITY

In order to determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to consider “the gravity of the violation,” among other criteria. 30 U.S.C. § 820(i). Gravity is “often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). Pursuant to the regulations promulgated at 30 C.F.R. § 100.3(e), the Secretary analyzes the seriousness of a violation with reference to three factors: (1) the likelihood of occurrence of the event against which a standard is directed; (2) the severity of the illness or injury if the event has occurred or was to occur; and (3) the number of persons potentially affected if the event has occurred or were to occur.

B. SIGNIFICANT AND SUBSTANTIAL

As discussed in greater detail below, the Secretary alleges that five of the alleged violations at issue in this proceeding were of a significant and substantial (“S&S”) nature. As defined by Section 104(d)(1) of the Mine Act, an S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d)(1). The Commission first interpreted this statutory language in *Cement Division, National Gypsum Company*, 3 FMSHRC 822 (April 1981), holding that a violation is properly designated as S&S “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Nat’l Gypsum*, 3 FMSHRC at 825. The Commission later elaborated on this standard in *Mathies Coal Company*, 6 FMSHRC 1 (Jan. 1984) (“*Mathies*”):

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. As a practical matter, the last two elements will often be combined in a single showing.

Mathies, 6 FMSHRC at 3–4 (footnote omitted).

The S&S nature of a violation is distinct from the violation's gravity. As noted by the Commission, "[t]he focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. The Commission has also emphasized that in accordance with the language of Section 104(d)(1), 30 U.S.C. § 814(d)(1), the S&S nature of a violation stems from "a reasonable likelihood that the [cited] condition . . . could contribute, significantly and substantially, to the cause and effect of a safety hazard." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574–75 (July 1984). Thus, "it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis added). Finally, the S&S inquiry must be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

C. NEGLIGENCE

In order to determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to also consider "whether the operator was negligent." 30 U.S.C. § 820(i). Thus, "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The Secretary defines negligence as follows:

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d). When analyzing an operator's negligence, the Secretary considers mitigating circumstances, such as actions taken by the operator to remedy hazardous conditions or practices. *Id.*

IV. SUMMARY OF THE EVIDENCE

In support of the facts underlying the alleged violations and proposed penalties, the Secretary offered the testimony of MSHA Inspector Billy Ray Meddings and copies of the six citations at issue, the field notes of Inspector Meddings, a document entitled "Assessed Violative History Report," and the revised basic ventilation plan for Respondent's Number 3 Mine. Respondent, in turn, offered the testimony of Jimmy Lindell Rowe, Terry K. ("Keith") Stevens, and Ronnie Johnson.

Admitted into evidence as Secretary's Exhibits 1 through 6 respectively, Citation Numbers 8231582, 8231583, 8231586, 8236506, 8236514, and 8236515 were issued by Inspector Meddings between August 5, 2009 and August 28, 2009, as he performed an E01 inspection² of Respondent's Number 3 Mine. S's Ex. 1-6; Tr. 193. At that time, Number 3 Mine was comprised of four working sections. Tr. 333. Each section was divided further into two production operations, designated as "super sections" or "MMUs," meaning that two continuous miner machines were operated in each section and the sections were ventilated using a "fishtail ventilation" system. Tr. 333-34. In turn, each super section consisted of nine entries. Tr. 347.

A. AUGUST 5, 2009

Inspector Billy Ray Meddings had been a member of the coal mining industry for over 30 years, including four and a half years as an inspector for MSHA. Inspector Meddings inspected the Number 4 section of Number 3 Mine on August 5, 2009, accompanied by Keith Stevens, an electrician who had been employed by Respondent for 11 years. Tr. 190-91, 232-33, 305-06; S's Ex. 7. Upon arriving at the Number 4 section with Mr. Stevens, Inspector Meddings briefly spoke to the day shift foreman and then proceeded to perform an "imminent danger run," which, according to Inspector Meddings, typically takes him 10 to 20 minutes to complete. Tr. 234-36. At the hearing, Inspector Meddings could not recall whether Mr. Stevens was present when he performed the imminent danger run. Tr. 235, 237. Thereafter, Inspector Meddings inspected a "scrubber"³ on the continuous miner machine in the active 039-0 MMU and determined that it was generating only 3739 cubic feet per minute ("CFM") of air, in contravention of

² Inspector Meddings explained that an E01 inspection is performed four times a year at a given mine and requires an inspection of "everything in the mine, all the airways, all the equipment, all their records, everything at that mine." Tr. 273-75. He further explained that the duration of an E01 inspection depends upon the size of the mine, but that larger mines like those operated by Respondent can take up to three months. Tr. 273-75.

³ Inspector Meddings described a scrubber as a device affixed to a continuous miner machine that uses water to filter the respirable dust generated by the miner out of the air:

A scrubber more or less is a air generating suction device that's on top of a miner. It will inhale all the dust, everything toward the face. It'll pull it through a filter system, the filter's got a water spray system on it. That's the first line. And then it starts taking the particles out of it, then it goes through a demister, and demister takes the other particles of respirable dust out of it, and then it ejects just the air. So it actually filters, you know, the respirable dust out.

Tr. 196; *see also* Tr. 200. He explained that scrubbers operate in conjunction with another system of water sprays at "the ripper head of the miner," which "try to get as much of [the dust] as it can soaked." Tr. 200-01. He further explained that an operator is not required to use a scrubber when the depth of penetration of an entry is no greater than 20 feet but that because Respondent's Number 3 Mine "normally all the time runs deep cuts, . . . they'll normally run the scrubber all the time, . . . even starting off at zero cuts." Tr. 195; *see also* Tr. 201-02.

Respondent's revised basic ventilation plan. Tr. 193, 196–97, 232; S's Ex. 1, 7. This plan, proffered by the Secretary and admitted into evidence as Secretary's Exhibit 9, requires a scrubber output of 4800 CFM. S's Ex. 9.

At the hearing, Inspector Meddings described the manner in which he typically measures the output of scrubbers, testifying that he uses a "Magna Healy gauge"⁴ to take three readings in each of a scrubber's port holes and then performs the necessary calculations to convert those readings to the output figure. Tr. 197–99. He maintained that he measured the output of the subject scrubber in this manner. Tr. 238–39. Additionally, his field notes reflect that he took two sets of such readings and found the output of the scrubber to be 3739 CFM based upon the first set of readings. S's Ex. 7. He testified that he took the second set of readings after Respondent's agents attempted to fix the scrubber by "clean[ing] the screen out more" and "fix[ing] the leaks on it." Tr. 199–200. However, because he calculated a lower output figure based upon the second set of readings, he disregarded those measurements and issued Citation Number 8231582 at 3:40 p.m. based upon the output figure of 3739 CFM that he initially calculated. Tr. 200; S's Ex. 1, 7. He subsequently terminated the Citation on August 6, 2009, noting that "[t]he scrubber motor has been replaced . . . and scrubber output is above the minimum 4800 CFM as required by the approved ventilation plan." S's Ex. 1; *see also* Tr. 205.

When questioned by Respondent's counsel, Inspector Meddings affirmed that the continuous miner machine "[p]robably more than likely" was backed away from the face of the mine at the time he inspected it and that it, therefore, was not producing any coal. Tr. 236–37. However, he denied having any knowledge as to whether Respondent's agents were awaiting delivery of a new motor for the subject scrubber at the time he arrived at the Number 4 section to inspect it. Tr. 237, 269–70.

With respect to the gravity of the charged violation, Inspector Meddings explained that a scrubber that fails to emit the required volume of air may lead to an accumulation of excessive dust, the inhalation of which can cause permanently disabling illnesses to miners, such as black lung disease and silicosis. Tr. 194, 202; S's Ex. 1. He also testified that dust may act as an ignition source. Tr. 241–42. He determined that the alleged violation was reasonably likely to cause an injury or illness, testifying that the subject scrubber "had been used all day shift" and "was still in operation" at the time of his inspection. Tr. 202–03; S's Ex. 1. He also noted that Respondent was currently "cutting approximately 12 inches of sandstone / shale roof which produces excessive dust." S's Ex. 1. Inspector Meddings admitted that he did not observe any dust, however. Tr. 242. He also determined that four miners would be affected by the violative condition, but he was unable to explain this assessment:

A: Normally I put -- and I could go back through my notes again, normally I put, if there's two buggy operators and a miner operator, I normally put three.

⁴ This reference to a "Magna Healy gauge" appears to be a transcription error, as the Secretary identified this device in her Post-Hearing Brief as a "magnahelic gauge." Secretary's Post-Hearing Brief ("S's Br.") at 4. In addition, Inspector Meddings recorded in his field notes, which were admitted into evidence as Secretary's Exhibit 7, that the day shift foreman informed him that the output of the subject scrubber had been measured prior to Inspector Meddings' inspection also using a "magnahelic gauge." S's Ex. 7.

Q: If you'd like to take a look --

A: Yeah, there may have been three shuttle cars hauling underneath him. I'm not for sure. I didn't put in my notes where the extra man came from, so you know, I'm not exactly one hundred percent sure where he came from.

Tr. 203–04; S's Ex. 1. Because he determined that a reasonable likelihood existed that a miner would be afflicted with a serious illness, Inspector Meddings characterized the alleged violation as significant and substantial in nature. Tr. 203; S's Ex. 1. Finally, Inspector Meddings explained that he found Respondent to have been moderately negligent in committing the violation based upon his belief that the day shift foreman had examined the subject scrubber but had failed to measure the output of the scrubber accurately. Tr. 204–05.

In conjunction with Citation Number 8231582, Inspector Meddings issued Citation Number 8231583 at 3:45 p.m. on August 5, 2009. Tr. 207; S's Ex. 2, 7. According to his testimony and field notes, he was informed by the day shift foreman upon arriving at the Number 4 section that the dust parameters and output of the subject scrubber had been measured during an onshift examination performed within 45 minutes of his arrival and that those readings complied with the mine's revised basic ventilation plan. Tr. 204–07; S's Ex. 7. Inspector Meddings concluded that the examination was inadequate, explaining, "this citation was issued because the scrubber, which I cited previously, wasn't working properly, and the foreman told me it was I checked it twice and never could get it up to speed. So it never was working properly." Tr. 207.

Finally, Inspector Meddings issued Citation Number 8231586 at 6:45 p.m. on August 5, 2009, alleging that Respondent failed to maintain a roof bolter machine being used on the active 039-0 MMU in permissible condition based upon his observations that: 1) the main control panel lacked two flat washers; 2) the cable reel was not fully insulated in three locations; 3) the half inch conduit was not properly repaired in two locations; and 4) an opening existed in the half inch conduit on the offside area work light, exposing an inner cable. S's Ex. 3, 7; Tr. 209–10, 243–46. Inspector Meddings terminated the Citation less than 30 minutes after issuing it, noting that the underlying conditions had been repaired. S's Ex. 3; Tr. 213.

With respect to the gravity of the violation, Inspector Meddings determined that an injury was reasonably likely to result based upon the frequency with which Respondent used this roof bolter machine, the number of cited defects, and the high volume of methane liberated by the mine. S's Ex. 3, 7; Tr. 211, 247. He explained that the violation exposed the two miners operating the machine to the hazard of fire or explosion and that because this hazard could result in a range of injuries or even a fatality, he designated the injury that could reasonably be expected as permanently disabling. S's Ex. 3, 7; Tr. 210–12. He also characterized the violation as significant and substantial in nature based upon the reasonable likelihood that the miners would sustain serious injuries. S's Ex. 3; Tr. 212. Finally, he determined that Respondent was moderately negligent in committing the violation based upon the number of cited defects. S's Ex. 3, 7; Tr. 212–13.

When questioned by counsel for Respondent, Inspector Meddings acknowledged that the cable stored on the cited cable reel was fully insulated and intact. Tr. 244. He also acknowledged that he had cited defective conduits but not the underlying cables, indicating that those cables were fully insulated and undamaged. Tr. 244–46. Further, he admitted that he was not aware of any instances of a fully insulated cable causing an ignition of methane or energizing the frame of equipment and thereby creating a risk of shock or electrocution. Tr. 246.

On behalf of Respondent, Keith Stevens offered an account of the August 5, 2009 inspection that diverged significantly from that of Inspector Meddings. In particular, Mr. Stevens testified that he and Inspector Meddings arrived at the Number 4 section of the mine on August 5, 2009, and immediately separated, with Inspector Meddings “tak[ing] off” and “check[ing], you know, just everything,” and Mr. Stevens proceeding to the continuous miner machine at issue. Tr. 308–09. Mr. Stevens testified that he went to the continuous miner machine within four or five minutes of their arrival at the section. Tr. 309. At the time, Mr. Stevens explained, the continuous miner machine was not mining coal or even located at the face; rather, it had been relocated “back the second block” and Respondent’s agents were in the process of removing the scrubber motor. Tr. 309–10.

According to Mr. Stevens, he observed Inspector Meddings inspecting the “pinner”⁵ approximately 20 minutes later, and he moved to join him. Tr. 310–11. Mr. Stevens confirmed that Inspector Meddings found four deficiencies on the machine. Tr. 311–20, 325–27. However, he testified, in essence, that these deficiencies were merely technical violations that did not present any hazards or risks of injury to the miners because none of the cables underlying the cited conduits had sustained any damage. Tr. 311–19.

Mr. Stevens explained that he subsequently returned to the continuous miner machine, where he was informed that it was “ready.” Tr. 320. He presumed that Inspector Meddings, meanwhile, “was going on across the section.” Tr. 320. Upon seeing Inspector Meddings, Mr. Stevens approached and invited him to inspect the machine. Tr. 321. Claiming that Inspector Meddings appeared upset or frustrated at the time, Mr. Stevens testified that Inspector Meddings proceeded to inspect the scrubber affixed to the continuous miner machine in the following manner:

A: He just grabbed the PO tube and just -- he usually sticks it down there so far, then they’ll raise it up and read it, raise it up and another reading. I mean, he just (indicates) laid it down. Never even looked at the gauge. Said it won’t pass. Just walked off. So we went out.

* * *

Q: How quick did he do it?

⁵ Prompted by counsel for Respondent, Mr. Stevens affirmed that the term “pinner” is another way to describe a roof bolter machine. Tr. 311.

A: I mean, whatever time it took to put the PO tube in there and out. I mean, there was no -- there was no (indicating) I didn't see him look at the gauge, and that's what shocked me. I mean, it was just -- I was awed. I couldn't believe it.

Q: Did you see him write down any numbers?

A: No, sir. At that point, I never. Not at that time. I never.

Q: Did he ask you to write down any numbers?

A: No.

* * *

Q: Did you see him even look at the gauge?

A: No.

Q: And what did he say to you after he had (indicating) –

A: “It won't pass,” and just turned and walked away.

Tr. 321–23.

B. AUGUST 20, 2009

On August 20, 2009, Inspector Meddings continued his E01 inspection of Respondent's Number 3 Mine at the Number 2 section of the mine. Tr. 215; S's Ex. 4, 7. During the inspection, he observed accumulations of loose coal and coal fines in numerous locations along the ribs and roadways in the nine entries and connecting cross cuts comprising the Number 2 section. Tr. 214–16; S's Ex. 4, 7. Inspector Meddings depicted the specific locations of these accumulations in a diagram of the Number 2 section that he sketched in his field notes. Tr. 215; S's Ex. 7. The accumulations ranged in depth from four to 15 inches along the ribs and two to four inches in the roadways. Tr. 215–16; S's Ex. 4, 7. Between the Number 8 and 9 entries, Respondent's agents had also “punched that break through” and failed to “clean the gob up in there,” resulting in an accumulation of material the depth of which was three feet. Tr. 216; S's Ex. 7. Based upon these observations, Inspector Meddings issued Citation Number 8236506 at 8:15 a.m., citing the accumulation of combustible materials in violation of 30 C.F.R. § 75.400. S's Ex. 4. He subsequently terminated the Citation when he returned to the Number 2 section on August 24, 2009, and recorded that the accumulations had been removed from the cited areas. Tr. 220, 254–55; S's Ex. 4.

At the hearing, Inspector Meddings testified that “probably some of [the accumulations were] wet” but that “the bulk of it . . . is normally dry material” because it dries as time elapses and it is run over by mining equipment. Tr. 216. He further testified that accumulations of combustible materials create a hazard of fire or explosion. Tr. 214–15. As an ignition source, he

identified a noncompliant electrical cable that he also cited during his inspection of the Number 2 section on August 20, 2009. Tr. 217–18; S’s Ex. 4, 7. He further noted the amount of methane liberated at Number 3 Mine as 1,200,000 cubic feet every 24 hours. Tr. 216–17; S’s Ex. 4.

Inspector Meddings characterized the violation of 30 C.F.R. § 75.400 as significant and substantial in nature based upon the extent of the accumulations; the presence of an ignition source, which created a reasonable likelihood that an accident would occur; and the number of miners exposed to the hazard. S’s Ex. 4, 7; Tr. 218–19. According to Inspector Meddings, because the hazard created by the violation could result in a range of injuries or even a fatality, he designated the injury or illness that could reasonably be expected as permanently disabling in the Citation.⁶ S’s Ex. 4; Tr. 218–19. Finally, he determined that the violation resulted from a moderate level of negligence, even though “[he] probably could have justified high easily.” Tr. 219.

When questioned by counsel for Respondent, Inspector Meddings affirmed that the noncompliant electrical cable that he pointed to as an ignition source had sustained damage to the “outer jacket” but that “[t]he cable was still covered with shielding” and “the inner conductors were still insulated.” Tr. 251–52. Inspector Meddings admitted that he was not aware of any such cables igniting coal. Tr. 252.

Ronnie Johnson, the chief electrician on the day shift at the time of the alleged violations, accompanied Inspector Meddings during his inspection on August 20, 2009, and was served Citation Number 8236506. S’s Ex. 4; Tr. 330–32. Mr. Johnson acknowledged that he did not accompany Inspector Meddings through each entry of the Number 2 section, that some accumulations of coal were present in those areas that he did travel with Inspector Meddings, and that he did not have any reason to disagree with the diagram of the section contained in Inspector Meddings’ field notes. Tr. 345, 349. He disputed the extent of these accumulations, however. In particular, he testified that Inspector Meddings “started complaining about how dirty the roadways looked” upon their arrival at the Number 2 section but that he thought they appeared “kind of normal” and “[n]ot excessively dirty.” Tr. 334, 337. He opined, “[i]t had been dusted, but I recollect it had been real black. Probably been rock dusted over some coal, what had been done.” Tr. 334–35. Mr. Johnson explained that he and Inspector Meddings proceeded on foot up the Number 4 entry to the face of the section, where the conditions also appeared to be “normal” and not “excessively dirty.” Tr. 335, 346–47. While he admitted that he did not observe Inspector Meddings take any measurements, he further disputed the depth of the accumulations along the rib of the entry, testifying that they appeared to be only two to four inches deep, rather than the four to 15 inches cited by Inspector Meddings. Tr. 336–37, 346; *see also* Tr. 347. Mr. Johnson speculated that these accumulations had resulted from Respondent’s agents cleaning the entry of loose coal with a “scoop” and that excess coal had “rolled over the scoop bucket when they went through.” Tr. 336; *see also* Tr. 347. He testified that he did not observe any miners operating the scoop but that he heard it, leading him to believe that miners were cleaning elsewhere in the section at the time of Inspector Meddings’ inspection. Tr. 335–37.

⁶ In his field notes, however, Inspector Meddings designated the injury or illness that could reasonably be expected as lost workdays or restricted duty. S’s Ex. 7. The Secretary failed to offer any explanation for this discrepancy.

Finally, Mr. Johnson denied that the noncompliant electrical cable cited by Inspector Meddings posed a risk of igniting the alleged accumulations based upon a number of considerations, including that “it was too far away” and that the shielding would prevent arcing. Tr. 339–40; *see also* Tr. 351. He explained that he sought the opinion of an electrical engineer on the issue and that the electrical engineer agreed with his assessment. Tr. 340. He further testified that the quantity of methane liberated by Number 3 Mine was irrelevant to the Citation because none was present at the time and the mine is ventilated by 600 million cubic feet of air per day. Tr. 341–42.

C. AUGUST 27, 2009

Inspector Meddings continued his E01 inspection of Respondent’s Number 3 Mine on August 27, 2009. S’s Ex. 5, 7. As part of that day’s inspection, he inspected the equipment in the Number 4 section of the mine and found a gap in the right side tram panel of a continuous miner machine that measured 0.025 inches, which exceeded the limit of 0.004 considered to be permissible. Tr. 221–22; S’s Ex. 5, 7. Accordingly, Inspector Meddings issued Citation Number 8236514 at 2:07 a.m., citing Respondent for a failure to maintain the machine in permissible condition, in violation of 30 C.F.R. § 75.503. S’s Ex. 5. He subsequently terminated the Citation on August 28, 2009, and recorded that the gap had been closed. Tr. 224; S’s Ex. 5.

Inspector Meddings testified that a failure to maintain a piece of equipment such as a continuous miner machine in permissible condition exposes miners to the hazard of fire. Tr. 221. He also noted the amount of methane liberated at Number 3 Mine as 1,200,000 cubic feet every 24 hours. Tr. 221; S’s Ex. 5, 7. He admitted, however, that he did not detect any methane at the continuous miner machine at the time he issued the Citation. Tr. 256–57. He also admitted that he does not possess any knowledge of the particular components of the machine enclosed by the subject panel or whether they are capable of arcing or sparking. Tr. 258.

Inspector Meddings characterized the violation as reasonably likely to cause injury or illness based upon the frequency with which the subject equipment is used by Respondent, the related exposure of miners to the condition, and the amount of methane liberated at the mine. Tr. 222; S’s Ex. 5, 7. He cited these considerations in characterizing the violation as significant and substantial in nature as well, testifying that any accident would be of a “serious nature to the miners around it or on the section.” Tr. 223; S’s Ex. 5. According to Inspector Meddings, because the hazard created by the violation could result in a range of injuries or even a fatality, he designated the injury or illness that could reasonably be expected as permanently disabling. Tr. 222–23; S’s Ex. 5, 7. Finally, Inspector Meddings determined that the violation resulted from a low degree of negligence because he typically finds multiple violative conditions when inspecting the permissibility of equipment but the impermissible gap in the electrical panel was the only issue that he detected on the continuous miner machine. Tr. 223–24; S’s Ex. 5, 7.

Jimmy Rowe, the chief electrician on the third shift at Respondent’s Number 3 Mine, accompanied Inspector Meddings during his inspection on August 27, 2009, and was served Citation Number 8236514. S’s Ex. 5; Tr. 293, 297. While he did not dispute the existence of a gap in the right side tram panel, he challenged the likelihood that the condition would injure a

miner, testifying that the electrical components enclosed by that particular panel were “confined to their own . . . sealed containers” and incapable of arcing or sparking. Tr. 297–300. Mr. Rowe contrasted the components enclosed by the right side tram panel with those enclosed by the left side tram panel, which protects “your pump contactor, your cutter contractor, your conveyor contactors and your scrubber contactors.” Tr. 298. He testified that he would have agreed with Inspector Meddings’ assessment of the gravity of the violation had it occurred on this latter panel. Tr. 298–99. He explained that he does not possess any knowledge of the type of component found behind the subject panel generating an arc or spark and igniting methane in a mine. Tr. 302–03. Finally, he explained that he does not possess any knowledge of a miner coming into contact with an electrical component through a gap of the size found by Inspector Meddings on the subject panel. Tr. 303.

Based upon his familiarity with the equipment at Respondent’s Number 3 Mine and with the continuous miner machine at issue in Citation Number 8236514, Mr. Johnson also opined that the components enclosed by the right side tram panel were incapable of arcing or sparking due to an absence of moving components. Tr. 342–43, 348. Accordingly, Mr. Johnson disagreed with Inspector Meddings’ assessment of the gravity of the violation:

Q: And Mr. Meddings issued it as reasonably likely to result in permanently disabling injury to 13 miners. Do you agree with that?

A: No.

Q: And why not?

A: There’s no emission source in that panel, plus it was not stated that there was any methane there, anyway.

Q: So what is the risk of a methane explosion, in your mind?

A: Very low.

Q: What was the risk of a methane ignition, in your mind?

A: Me, myself, I’ve been there at this mine ten years and I’ve never found in the working face explosive mixtures myself. I carry a spotter continuous with me.

Q: So what was the risk, in your mind, of a methane ignition?

A: None.

Tr. 344.

D. AUGUST 28, 2009

Inspector Meddings continued his E01 inspection of the Number 4 section of Respondent's Number 3 Mine on August 28, 2009. S's Ex. 6, 7. As part of that day's inspection, he measured the level of methane present in the Number 2 entry of the section and found it to be 0.2 percent. S's Ex. 6, 7. He subsequently attempted to measure the air velocity behind the "line curtain" in the Number 2 entry using first a calibrated anemometer and then chemical smoke, but he was unable to detect any movement. Tr. 226; S's Ex. 6, 7. He thereafter issued Citation Number 8236515 at 5:15 a.m., citing Respondent for a failure to comply with its approved ventilation plan. Tr. 224–25; S's Ex. 6, 7. This plan requires Respondent to maintain a minimum air velocity of 1000 CFM at the "[i]nby end of line curtain[s] in idle places." S's Ex. 9; *see also* Tr. 225. Inspector Meddings terminated the Citation 45 minutes later, noting that "[t]he wing curtain was extended into the intersection and 4050 CFM was measured using a calibrated anemometer." S's Ex. 6; Tr. 230–31.

Inspector Meddings noted that the foreman, Rick Wright, had recorded the date and time and his initials in the Number 2 entry approximately 22 minutes prior to issuance of the Citation. Tr. 227–28; S's Ex. 6, 7. He also noted that the line curtain did not extend into the "intersection," thereby hindering its ability "to catch the air and shove it up in the entry." Tr. 228; S's Ex. 7.

Inspector Meddings testified that a deficient level of air flow in a mine may lead to the accumulation of methane to explosive concentrations. Tr. 225–26. He explained that he characterized the cited condition as unlikely to result in an injury, and not significant and substantial in nature, because he did not detect any such accumulation at the time of his inspection. Tr. 228–30; S's Ex. 6, 7. According to Inspector Meddings, should an accumulation of methane develop and cause an injury, it would be permanently disabling because the hazard created by the violation could result in a range of injuries or even a fatality. Tr. 229; S's Ex. 6, 7. Finally, Inspector Meddings determined that the violation resulted from a high degree of negligence because the foreman had checked the conditions of the entry only 22 minutes prior to the inspection, as reflected by the date, time, and initials recorded in the entry. Tr. 230; S's Ex. 6, 7.

Upon questioning by counsel for Respondent, Inspector Meddings affirmed that Respondent's agents were performing a "belt move" and "power move" and that no equipment or miners were present in the Number 2 entry at the time of his inspection. Tr. 260; *see also* S's Ex. 7. While Inspector Meddings testified that equipment was "trammings around the section," he also affirmed that equipment is not permitted to enter inby the last open crosscut before a "gas test" is performed. Tr. 261. In addition, Inspector Meddings testified that he could not recall whether a rock had dislodged the line curtain out in the intersection and that such an occurrence "absolutely" could reduce the amount of air reaching the mine face. Tr. 262. He admitted that he had "no idea" when the line curtain had fallen and that he did not ask the section foreman as to whether it had been properly hung at the time he checked the entry, even though such information could have been pertinent. Tr. 262.

Inspector Meddings also admitted that he did not inform Jim Rowe, who was accompanying him during his inspection, of the Citation at the time he issued it. Tr. 259–60. During his testimony, Mr. Rowe confirmed that Inspector Meddings neglected to notify him of the Citation at that time. Tr. 296. Mr. Rowe further testified that he lacked any knowledge of the circumstances surrounding the Citation, explaining that he did not accompany Inspector Meddings to the face of the entry and that he generally waits at the mouth of the entry during inspections. Tr. 295–97.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. **CITATION NUMBER 8231582: ALLEGED VIOLATION OF 30 C.F.R. § 75.370(a)(1)**

1. **ALLEGED VIOLATION AND PROPOSED PENALTY**

At 3:40 p.m. on August 5, 2009, Inspector Meddings issued Citation Number 8231582 to Respondent pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), alleging in the “Condition or Practice” section as follows:

The approved ventilation plan is not being followed on the active 039-0 MMU. The Joy Continuous Mining Machine CO# 0134 scrubber output is only 3,739 CFM (78% what's required). The approved plan requires the minimum 4,800 CFM. This section is cutting approximately 12 inches of sandstone / shale roof which produces excessive dust. An improper working scrubber allows excessive amounts of rock/coal dust to be suspended into the mine atmosphere. This section produces coal two shift per day and average of five days per week. This condition exposes these miners to the hazards associated with black lung disease that would result in permanently disabling illness. The operator immediately began repairs on the mining machine.

S’s Ex 1. The Citation further alleges that Respondent’s failure to comply with the approved ventilation plan constitutes a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.370(a)(1), which requires operators to develop and follow a ventilation plan designed to control methane and respirable dust in a manner suitable to the conditions and mining system at the mine, subject to the approval of the district manager. *Id.*

Inspector Meddings determined that Respondent’s alleged violation of 30 C.F.R. § 75.370(a)(1) was reasonably likely to cause injury or illness, that such injury or illness could reasonably be expected to be permanently disabling, and that four people would be affected. S’s Ex. 1. He also determined that the violation was significant and substantial in nature and that Respondent’s degree of negligence in committing the violation was moderate. *Id.*

For the alleged violation, the Secretary proposed the assessment of a civil penalty in the amount of \$1,530.

2. LIABILITY

As set forth above, Citation Number 8231582 alleges that Respondent failed to comply with the basic revised ventilation plan governing its Number 3 Mine on August 5, 2009, based upon Inspector Meddings' determination that the scrubber affixed to the continuous miner machine in the active 039-0 MMU failed to generate a volume of air that met the minimum threshold required by the plan. S's Ex. 1. In her Post-Hearing Brief, the Secretary cites the testimony and field notes of Inspector Meddings and the observations he recorded in the body of the Citation to support the alleged violation. Secretary's Post-Hearing Brief ("S's Br.") at 3-4 (citing Tr. 193, 196-98, 200-01; S's Ex. 1, 7). Respondent, on the other hand, claims that Inspector Meddings "act[ed] outside the bounds of his authority to issue a citation[] without a factual basis, let alone underlying legal merit." Respondent's Post-Hearing Brief ("R's Br.") at 3-4. More specifically, Respondent argues that the testimony of Mr. Stevens establishes that Inspector Meddings performed a "non-existent, invalid test" of the subject scrubber and that the Citation, consequently, was "issued improvidently" and should be vacated. R's Br. 2-4.

Upon consideration of the evidence presented by the parties concerning Inspector Meddings' inspection of the subject scrubber, the undersigned finds in favor of the Secretary. At the hearing, Inspector Meddings credibly described in significant detail the technique that he typically uses to measure the output of scrubbers, and he maintained that he measured the output of the subject scrubber in the same manner. Tr. 197-99, 238-39. He also recorded in his field notes a series of measurements that he collected from the subject scrubber and the calculations that he performed based upon those measurements, which corroborate his testimony and are also deemed credible given their specificity and contemporaneous nature. S's Ex. 7. Finally, the considerable experience of Inspector Meddings in the coal mining industry lends further credibility to his account of the inspection. Altogether, this evidence compels a finding that Inspector Meddings properly measured the output of the scrubber and found it to be 3739 CFM, in violation of Respondent's basic revised ventilation plan.

Respondent failed to elicit any conflicting testimony from Inspector Meddings or offer any alternative explanation for the measurements and calculations set forth in his field notes. The account of the inspection offered by Mr. Stevens also fails to sufficiently rebut this evidence. Above all, the undersigned finds that the evidence presented by Inspector Meddings is simply more reliable than that offered by Mr. Stevens. Unlike Inspector Meddings, Mr. Stevens did not record any contemporaneous notes regarding the citations at issue, and he testified at the hearing based solely on his memory of the events underlying those citations, events which occurred over two years before. Tr. 328. This consideration does not necessarily discredit his testimony, and indeed, he maintained at the hearing that he did not have any reason to question his memory, particularly of the suspect manner in which Inspector Meddings measured the output of the subject scrubber. Tr. 329. Mr. Stevens expressed hesitation about certain events, however, due to the amount of activity occurring in Number 3 Mine on the day of the inspection and the passage of time since that day. For example, when asked whether he accompanied Inspector Meddings as he exited the mine, Mr. Stevens testified, "I believe I was the one that rode out with him, now. I mean, like I say, we had so much going on that night" Tr. 325. Additionally, when questioned about the time at which Inspector Meddings began to inspect the scrubber, Mr. Stevens responded, "I'm not sure when he checked it, because it's been so long.

I'm not sure if he checked it or not, you know, I don't know. I just know how it was checked when I told him it was ready to go." Tr. 309.

This testimony casts some doubt on the reliability of Mr. Stevens' account of the inspection and suggests that he was not entirely certain about the sequence of events that occurred on August 5, 2009. In addition, while Mr. Stevens recalled that Inspector Meddings inspected the roof bolter machine prior to his inspection of the scrubber, such a sequence of events conflicts with the contemporaneous field notes of Inspector Meddings, which reflect that Inspector Meddings cited the noncompliant scrubber at 3:40 p.m. and the noncompliant roof bolter machine more than three hours later at 6:45 p.m. This point similarly suggests that Mr. Stevens' memory of the inspection was faulty. Thus, while Mr. Stevens appeared to be sincere in his insistence that Inspector Meddings measured the output of the scrubber in a suspect manner, the weight of the evidence supports a finding that Inspector Meddings properly inspected the subject scrubber and subsequently issued Citation Number 8231582 based upon that inspection.⁷

Based upon the foregoing discussion, the undersigned finds that the Secretary has met her burden of demonstrating by a preponderance of the evidence that Inspector Meddings properly measured the output of the subject scrubber on August 5, 2009, and found it to be less than that required by its basic revised ventilation plan, and that Respondent failed to sufficiently refute the evidence in the record supporting the violation. Accordingly, Respondent is liable for failing to comply with its basic revised ventilation plan, in violation of 30 C.F.R. § 75.370(a)(1), at its Number 3 Mine on August 5, 2009.

⁷ Even if Mr. Stevens' recollection of the technique used by Inspector Meddings to measure the output of the scrubber was accurate, that testimony does not necessarily preclude a finding that Inspector Meddings properly inspected the subject scrubber at the outset of the inspection without the knowledge of Mr. Stevens. While such a scenario is inconsistent with the testimony of Mr. Stevens that he proceeded to the continuous miner machine within only four or five minutes of their arrival at the Number 4 section, given the questionable reliability of Mr. Stevens' account, the undersigned finds it plausible that Inspector Meddings properly measured the output of the subject scrubber as 3739 CFM while outside the presence of Mr. Stevens, that Respondent's agents determined a faulty motor caused the deficiency found by Inspector Meddings, and that Mr. Stevens arrived at the continuous miner machine thereafter, at which time Respondent's agents were awaiting a replacement motor. Under this scenario, the perfunctory inspection allegedly performed by Inspector Meddings would not have formed the basis of the Citation but, rather, would have constituted an attempt by Inspector Meddings to determine whether the violative condition had been abated. This sequence of events is consistent with the documentary evidence concerning the times at which Inspector Meddings cited the noncompliant scrubber and noncompliant roof bolter machine.

3. PENALTY

a. Gravity and Significant and Substantial Nature of the Violation

In her Post-Hearing Brief, the Secretary cites the testimony of Inspector Meddings for his designations of the gravity and significant and substantial nature of the violation. S's Br. at 4–5, 13–14 (citing Tr. 202–03). While Respondent hotly contested its liability for the violation, it opted not to challenge Inspector Meddings' characterization of these aspects of the violation.

Upon consideration, the undersigned disagrees with Inspector Meddings' determinations. As previously discussed, in order to establish the significant and substantial nature of a violation, the Secretary is required to demonstrate four elements under *Mathies*: 1) that the underlying violation of a mandatory safety standard occurred; 2) that the violation contributed to a discrete safety hazard; 3) that the hazard in question is reasonably likely to result in an injury; and 4) that the injury in question is reasonably likely to be of a reasonably serious nature. Having concluded that Respondent violated 30 C.F.R. § 75.370(a)(1) as charged, the first element of *Mathies* is satisfied.

Turning to the second element of *Mathies*, the record contains insufficient evidence to support a finding that the violation contributed to a discrete safety hazard. According to Inspector Meddings, a malfunctioning scrubber allows excessive coal and rock dust to accumulate in a mine, which contributes to the risk of respiratory illnesses such as black lung disease. S's Ex. 1; Tr. 194, 202. Respiratory illnesses resulting from exposure to respirable coal mine dust, including coal workers' pneumoconiosis, emphysema, silicosis, and chronic bronchitis (collectively referred to as "black lung"), undoubtedly remain a serious risk to coal miners' health. Lowering Miners' Exposure to Respirable Coal Mine Dust, 75 Fed. Reg. 64,412, 64,413 (Oct. 19, 2010). Indeed, data from the National Institute for Occupational Safety and Health indicate that black lung is becoming more prevalent among the nation's coal miners, with even younger miners showing evidence of advanced and seriously debilitating lung disease. *Id.* The Commission has also recognized the insidious nature of dust-induced respiratory illnesses. In affirming an administrative law judge's decision holding that respirable coal dust in excess of the permissible level set forth at 29 C.F.R. § 70.100(a) is serious and substantial, the Commission asserted that "[t]here is no dispute . . . that overexposure to respirable dust *can* result in chronic bronchitis and pneumoconiosis." *Consolidation Coal Co.*, 8 FMSHRC 890, 898 (June 1986) (emphasis added), *rev. denied*, 824 F.2d 1071 (D.C. Cir. 1987). Respondent did not dispute the impact that exposure to respirable coal mine dust can have on coal miners' health.

The parties also do not dispute that the function of a scrubber is similar to that of a vacuum cleaner in that it suctions air from the mine into its filtration system, which removes any dust generated during mining operations from the air, and then the scrubber emits fresh air back to the mine atmosphere. Tr. 196, 200, 324. Given this design, Inspector Meddings reasonably inferred from the deficient output of the subject scrubber that it was not properly suctioning air into its system.

The Secretary failed to present sufficient evidence, however, that the malfunctioning scrubber resulted in the accumulation of excessive dust in the section on the day in question.

First, the record is not clear that use of the subject scrubber was even required at the time it was malfunctioning. While Inspector Meddings recorded in the body of the Citation that “[t]his section is cutting approximately 12 inches of sandstone / shale roof which produces excessive dust,” he also testified that operators are not required to use a scrubber when the depth of penetration into an entry is no greater than 20 feet. S’s Ex. 1; Tr. 195, 201–02. In addition, Respondent’s basic revised ventilation plan prescribes, “If the scrubber becomes inoperative the depth of penetration will be limited to 20 feet.” S’s Ex. 9 (emphasis in original omitted). The record lacks any evidence that the continuous miner machine was making a cut greater than 20 feet, and that use of the subject scrubber was therefore required, at the time it was malfunctioning. Indeed, the only evidence of the precise location of the continuous miner machine on the day in question is the testimony of Inspector Meddings and Mr. Stevens that it had been backed away from the face of the mine. Tr. 236–37; Tr. 309–10. According to Inspector Meddings, the day shift foreman had also informed him that the dust parameters and output of the subject scrubber had been measured during an onshift examination performed within 45 minutes of his arrival on the section and that those readings complied with the mine’s revised basic ventilation plan. Tr. 204–07; S’s Ex. 7. As discussed more fully below, the evidentiary record does not support a finding that these measurements were improperly taken and that the output of the subject scrubber was, in fact, deficient at the time of the onshift examination. Thus, even if the continuous miner machine was operating in an area where use of the subject scrubber was required, the record does not establish that it was malfunctioning for a significant period of time. In addition, the subject scrubber was not fully inoperative. Rather, it was merely operating at a reduced capacity, generating 78% of the volume of air required by Respondent’s revised basic ventilation plan. Finally, Inspector Meddings testified that he did not observe any airborne dust during his inspection of the Number 4 section. Tr. 242. He also appears not to have taken any air quality readings, which would have established whether dust levels exceeded regulatory limits.

Given the absence of evidence in the record that use of the subject scrubber was required at the time it was malfunctioning, that it was malfunctioning for a significant period of time, and that excessive dust levels were indeed present in the Number 4 section at the time of Inspector Meddings’ inspection, the undersigned finds that the contribution of the malfunctioning scrubber to excessive levels of respirable coal dust in the section on August 5, 2009, was not significant and substantial. Therefore, the second element of the *Mathies* test has not been satisfied, and the violation charged in Citation Number 8231582 is found not to be significant and substantial in nature.

The undersigned now turns to the gravity of the violation. While the severity of respirable illnesses caused by exposure to respirable coal dust is undeniably grave, the undersigned is compelled to find based upon the foregoing discussion that the likelihood that the malfunctioning scrubber would result in such illnesses is low at most. Additionally, the Secretary failed to present sufficient evidence of the number of miners impacted by the malfunctioning scrubber. Inspector Meddings recorded in his field notes that “[a]ll men on Sec. (13) x2” would be exposed to hazards caused by the violative condition. S’s Ex. 7. The meaning of this notation is unclear. He also recorded in the body of the Citation that four miners would be affected, but as previously recounted, he was unable to explain this determination at the hearing:

A: Normally I put -- and I could go back through my notes again, normally I put, if there's two buggy operators and a miner operator, I normally put three.

Q: If you'd like to take a look --

A: Yeah, there may have been three shuttle cars hauling underneath him. I'm not for sure. I didn't put in my notes where the extra man came from, so you know, I'm not exactly one hundred percent sure where he came from.

Tr. 203–04; S's Ex. 1. Based upon these considerations, the undersigned finds the gravity of the violation to be moderate.

b. Negligence

In her Post-Hearing Brief, the Secretary cites the testimony of Inspector Meddings concerning his determination that Respondent was moderately negligent in committing the charged violation. S's Br. at 5 (citing 204–06). Respondent again opted not to challenge Inspector Meddings' characterization of this aspect of the violation.

Upon consideration, the undersigned finds that the record supports a finding that Respondent exhibited a low degree of negligence with respect to the malfunctioning scrubber. Inspector Meddings testified that he accepted the representations of the day shift foreman that an onshift examination of the subject scrubber had been performed. Tr. 204–05. As discussed more fully below, the evidentiary record does not support a finding that these measurements were improperly taken and that the output of the subject scrubber was, in fact, deficient at the time of this examination. The fact that the scrubber appears to have been functioning properly as of the onshift examination is a considerable mitigating factor. In addition, Inspector Meddings recorded in his field notes that he inspected the scrubber within 45 minutes of the onshift examination. S's Ex. 7. Thus, the record supports a finding that the scrubber was malfunctioning for a relatively brief amount of time. Finally, the location of the continuous miner machine suggests that Respondent had exercised some diligence and identified an issue. As noted above, Inspector Meddings affirmed at the hearing that the continuous miner machine "[p]robably more than likely" was backed away from the face of the mine at the time of his inspection and that it, therefore, was not producing any coal. Tr. 236–37. In its Post-Hearing Brief, Respondent attributes the location of the continuous miner machine to "the company [having] recognized an issue between first and second shift" and contends that it "was in the process of correcting the problem" at the time of Inspector Meddings' inspection. R's Br. at 3–4 (citing Tr. 309–10). The Secretary did not offer any alternative explanation for the continuous miner machine having been moved away from the face of the mine during a production shift, and the undersigned finds the explanation of Respondent to be plausible. Based upon these considerations, the undersigned finds that Respondent's negligence in committing the violation to be low.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent's history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 348 violations that became final orders in the preceding 15-month period over the course of 743 days of inspection. Of those 348 violations, 15 consisted of violations of 30 C.F.R. § 75.370(a)(1). In support of these figures, the Secretary proffered a document entitled "Assessed Violation History Report," which was admitted into evidence as Secretary's Exhibit 8. Respondent did not challenge this evidence.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent's ability to remain in business. Stip. 6. The parties also stipulated that Respondent's Number 3 Mine produced 1,789,927 tons of coal and had 655,991 hours worked in 2008, the year preceding that in which Citation Number 8236517 was issued. Stip. 5. Finally, the regulations promulgated by MSHA provide for a "10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector." 30 C.F.R. § 100.3(f). The Secretary found that Respondent's agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the 10% reduction in the proposed penalty amount. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, including a reduction in the levels of gravity and negligence, the undersigned finds that the appropriate penalty to assess for the violation charged in Citation Number 8231582 to be \$250. Further, this Citation shall be modified to low negligence, injury unlikely, and non-S&S.

B. CITATION NUMBER 8231583: ALLEGED VIOLATION OF 30 C.F.R. § 75.362(a)(2)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 3:45 p.m. on August 5, 2009, Inspector Meddings issued Citation Number 8231583 to Respondent pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), alleging in the "Condition or Practice" section as follows:

An inadequate on shift exam has been conducted on the active 039-0 MMU. When the scrubber output was checked on the Joy Continuous Miner CO# 0134 only 3,739 CFM could be measured. The approved ventilation plan requires a minimum of 4,800 CFM. This dust parameter exam was conducted within 45 minutes of this inspection. This inadequate exam of the improper working scrubber is allowing excessive dust into the mine atmosphere exposes miners working on this active section to the hazards associated with black lung disease that would result in permanently disabling illness.

S's Ex. 2. The Citation further alleges that Respondent's failure to conduct an adequate onshift examination constitutes a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.362(a)(2), which requires "[a] person designated by the operator [to] conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan" as part of the requisite onshift examination. The provision further provides:

In those instances when a shift change is accomplished without an interruption in production on a section, the examination shall be made anytime within 1 hour of the shift change. In those instances when there is an interruption in production during the shift change, the examination shall be made before production begins on a section. Deficiencies in dust controls shall be corrected before production begins or resumes. The examination shall include air quantities and velocities, water pressures and flow rates, excessive leakage in the water delivery system, water spray numbers and orientations, section ventilation and control device placement, and any other dust suppression measures required by the ventilation plan.

30 C.F.R. § 75.362(a)(2).

Inspector Meddings determined that Respondent's alleged violation of 30 C.F.R. § 75.362(a)(2) was reasonably likely to cause injury or illness, that such injury or illness could reasonably be expected to be permanently disabling, and that four people would be affected. S's Ex. 2. He also determined that the violation was significant and substantial in nature and that Respondent's degree of negligence in committing the violation was moderate. *Id.*

Finally, the Secretary proposed the assessment of a civil penalty in the amount of \$1,304.00 for the alleged violation.

2. LIABILITY

Citation Number 8231583 alleges that Respondent performed an inadequate onshift examination on the active 039-0 MMU on August 5, 2009, in violation of 30 C.F.R. § 75.362(a)(2). S's Ex. 2. As the condition underlying this alleged violation, the Citation refers to the insufficient output of the scrubber detected by Inspector Meddings and notes that the examination of the scrubber had been performed within 45 minutes of his inspection. *Id.* The Secretary cites the testimony of Inspector Meddings and the observations he recorded in the Citation to support the alleged violation. S's Br. at 6 (citing Tr. 206–08; S's Ex. 2). As Respondent claimed with reference to Citation Number 8231582, Respondent argues here that Inspector Meddings "act[ed] outside the bounds of his authority to issue a citation[] without a factual basis, let alone underlying legal merit." R's Br. at 3–4. Respondent contends that the testimony of Mr. Stevens demonstrates that Respondent "had recognized an issue [with the subject scrubber] between first and second shift and was in the process of correcting the problem" by removing the scrubber motor and that Inspector Meddings subsequently performed a "non-existent, invalid test" of the output of the scrubber. R's Br. 2–4 (citing Tr. 309–10, 321–

23). Respondent contends that Citation Number 8231583 was “issued improvidently” on this basis and urges the undersigned to vacate it. R’s Br. 2–4.

As noted above, the cited standard requires “[a] person designated by the operator [to] conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan.” 30 C.F.R. § 75.362(a)(2). This standard imposes an obligation on an operator to conduct an examination sufficient to detect existing conditions that do not comply with the respirable dust control parameters contained in the mine’s ventilation plan. *See Twentymile Coal Co.*, 34 FMSHRC 2138, 2171 (Aug. 9, 2012) (ALJ). In order to establish that an operator failed to perform such an examination, the Secretary is required to show that conditions existed in the area subject to the examination that did not comply with the respirable dust control parameters specified in the mine’s ventilation plan and that the operator failed to detect them, as evidenced by a failure to record or otherwise report the conditions. *See id.*; *Shelby Mining Co., LLC*, 31 FMSHRC 1501, 1510 (Dec. 31, 2009) (ALJ).

Upon consideration, the undersigned finds that the Secretary has failed to demonstrate by a preponderance of the evidence that Respondent performed an inadequate onshift examination on August 5, 2009, in violation of 30 C.F.R. § 75.370(a)(1), as charged in Citation Number 8231583. First, the Secretary claims in her Post-Hearing Brief that Inspector Meddings “inspected the mine’s shift book to determine if the hazardous condition had been recorded” and “[u]pon examination of the shift book, . . . found that no record was made of the ventilation hazard.” S’s Br. at 6 (citing Tr. 206–08; S’s Ex. 2). The testimonial and documentary evidence cited by the Secretary do not indicate that Inspector Meddings reviewed Respondent’s records and found them to be lacking in any way. In fact, the undersigned is unable to locate any portion of the record that supports the Secretary’s claim. Rather, the record supports a finding that, upon his arrival at the Number 4 section, Inspector Meddings was verbally informed by the day shift foreman that the output of the subject scrubber had been measured and found to be compliant with the mine’s ventilation plan during the onshift examination performed within 45 minutes of Inspector Meddings’ inspection. Tr. 204, 206–07; S’s Ex. 7. As discussed above, the record also demonstrates that Inspector Meddings properly measured the output of the scrubber and found it to be less than the minimum threshold set by the ventilation plan.

Inspector Meddings relied upon these considerations alone to conclude that the scrubber “never was working properly” and that Respondent’s agents failed to detect it during the onshift examination. Tr. 207, 242–43. Such a leap is untenable. “The mere fact that conditions existed at the time of the inspection is insufficient evidence from which to infer the conditions existed at the time of the on-shift examination.” *Cemex, Inc.*, 32 FMSHRC 1897, 1901 (Dec. 27, 2010) (ALJ). The Secretary failed to offer any evidence other than the unsupported belief of Inspector Meddings that the violative condition of the scrubber existed at the time of the onshift examination. The lack of persuasive evidence upon which to find that the violative condition of the scrubber existed at the time of the onshift examination entirely undercuts the Secretary’s position. In addition, as discussed above, the location of the continuous miner machine suggests, as argued by Respondent in its Post-Hearing Brief, that Respondent’s agents had identified an issue with the scrubber during the onshift examination and were preparing to remedy it. Under those circumstances, the alleged violation does not stand.

Based upon the foregoing discussion, the undersigned finds that the record lacks sufficient evidence to support the violation of 30 C.F.R. § 75.370(a)(1) charged in Citation Number 8231583. Accordingly, this Citation is vacated.

C. CITATION NUMBER 8231586: ALLEGED VIOLATION OF 30 C.F.R. § 75.503

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 6:45 p.m. on August 5, 2009, Inspector Meddings issued Citation Number 823586 to Respondent pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), alleging in the “Condition or Practice” section as follows:

The Fletcher Bolter Company No. 006 being used on the active 039-0 MMU is not being kept in permissible condition, the following conditions were found during this inspection.

1. The Main Control Aluminum panel has two flat washers missing
2. The cable reel is not fully insulated in three areas measuring 9”, 9” and 4” long.
3. ½ inch Conduit not properly repaired in two different locations on the rear area light.
4. Opening exist in the ½” conduit on the offside area work light exposing inner 120 cable.

This mine operates three shifts per day and average five days per week and is currently on a 5 day methane spot and liberates over 1,000,000 CFM of methane per 24 hour period. These conditions exposes these miners to the hazards associated with methane / dust explosions that would result in permanently disabling injuries.

S’s Ex. 3. The Citation further alleges that these conditions constitute a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.503, which provides, “The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.” *Id.*

Inspector Meddings determined that Respondent’s alleged violation of 30 C.F.R. § 75.503 was reasonably likely to cause injury or illness, that such injury or illness could reasonably be expected to be permanently disabling, and that two people would be affected. S’s Ex. 3. He also determined that the violation was significant and substantial in nature and that it resulted from a moderate degree of negligence on the part of Respondent.

For the alleged violation, the Secretary proposed the assessment of a civil penalty in the amount of \$1,111.00.

2. LIABILITY

Upon consideration, the undersigned finds that the Secretary has demonstrated by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.503 as charged in the

Citation. According to the field notes and testimony of Inspector Meddings, he observed the above-described conditions on a roof bolter machine being used on the active 039-0 MMU during his inspection on August 5, 2009. S's Ex. 3, 7; Tr. 209–10, 243–46. Mr. Stevens acknowledged these violative conditions at the hearing, Tr. 311–20, 325–27, and Respondent does not contest the alleged violation of 30 C.F.R. § 75.503 in its Post-Hearing Brief, R's Br. at 2, 5. The uncontroverted evidence presented by the Secretary in support of the alleged violation of 30 C.F.R. § 75.503 is sufficient to establish the fact of the violation. Accordingly, the undersigned finds that Respondent is liable for violating 30 C.F.R. § 75.503 for failing to maintain the roof bolter machine being used on the active 039-0 MMU in permissible condition, as charged in the Citation.

3. PENALTY

a. Gravity and Significant and Substantial Nature of the Violation

i. Arguments of the Parties

In her Post-Hearing Brief, the Secretary cites the testimony of Inspector Meddings and the Citation itself to argue in favor of the designated gravity and the significant and substantial nature of the violation. S's Br. at 7, 14 (citing Tr. 211–12; S's Ex. 3). In particular, the Secretary contends that Respondent's failure to maintain the roof bolter machine in permissible condition was reasonably likely to result in a methane ignition or explosion given the volume of methane liberated by Number 3 Mine, that such an occurrence was reasonably likely to result in permanently disabling injuries, and that the two miners normally assigned to operate the machine would be affected. S's Br. at 7 (citing Tr. 211–12). Relying upon the same considerations to argue that the violation was significant and substantial in nature, the Secretary maintains that the violation contributed to a discrete safety hazard "because the condition of the equipment was not permissible" and that the operation of the equipment in this condition "would reasonably likely lead to a serious injury to the bolter operators being exposed to a methane explosion resulting from a spark created by the equipment that was not permissible." S's Br. at 14 (citing Tr. 212; S's Ex. 3).

Respondent contends that the cited defects were neither reasonably likely to result in injury nor significant and substantial in nature. R's Br. at 5–7. Because the alleged hazard was an ignition or explosion of methane, Respondent argues, the Secretary is required to demonstrate that "a confluence of factors" existed to create a reasonable likelihood of such an occurrence. R's Br. at 5–6 (citing *Sidney Coal Co.*, 31 FMSHRC 1197, 1202 (Oct. 8, 2009) (ALJ) (citation omitted)). Claiming that the Secretary "falls woefully short of meeting [this] legal burden of proof," Respondent notes that the Secretary did not present any evidence of methane being present at the time of the Citation's issuance or of a violation of the approved ventilation plan governing the mine. R's Br. at 6. Rather, Respondent argues, the Secretary relies solely upon the volume of methane liberated by the mine on a daily basis. R's Br. at 6 (citing Tr. 216). Respondent contends that this reliance is misplaced, because the mine operator was required to comply with the approved ventilation plan, which was designed to dilute and render harmless any methane or respirable dust encountered during normal mining operations. R's Br. at 6–7. Pursuant to this plan, "the amount of methane in the continued normal mining atmosphere of the

No. 3 Mine is approximately 0.1% -- fifty (50) times less than the amount of methane needed in an atmosphere to create an explosive range of methane.” R’s Br. at 6–7. To reflect the improbability of an injury, Respondent urges the undersigned to modify the gravity and significant and substantial designations in the Citation and reduce the penalty accordingly. R’s Br. at 7.

ii. Discussion

As previously discussed, in order to establish the significant and substantial nature of a violation, the Secretary is required to demonstrate four elements under *Mathies*: 1) that the underlying violation of a mandatory safety standard occurred; 2) that the violation contributed to a discrete safety hazard; 3) that the hazard in question is reasonably likely to result in an injury; and 4) that the injury in question is reasonably likely to be of a reasonably serious nature. The Commission has emphasized that designations of permissibility violations as significant and substantial especially “must be based on the particular facts surrounding the violation, including the nature of the mine involved.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988) (“*Texasgulf*”). The Commission thereby recognized that “the individual nature of a mine with regard to its methane liberations and its history of previous emissions and explosions has a bearing on the validity of an S&S finding.” *Knox Creek Coal Corp.*, 2010 WL 5619977, *45 (Dec. 27, 2010) (ALJ) (“*Knox Creek*”).

Applying the foregoing principles to the record in this case, the undersigned finds that the first element of *Mathies* is satisfied, as the fact of the violation has been established. Regarding the second element, Inspector Meddings determined that the violative conditions that he observed on the roof bolter machine exposed miners to the hazards associated with an equipment fire or a methane- or dust-fueled explosion. S’s Ex. 3, 7; Tr. 210–11. With respect to the improperly repaired conduit in particular, he explained that “it has to be repaired as approved, spliced to maintain any flames that would be inside of it.” Tr. 209–10. Respondent does not challenge this alleged hazard. The undersigned agrees and finds that the violation contributed to the discrete safety hazard of exposing a potential ignition source to the mine atmosphere, where it could trigger an ignition or explosion. Further, little question exists that any injury resulting from such a hazard could be severe or even fatal. Thus, the second and fourth elements of *Mathies* are also met.

The undersigned now turns to the third element of *Mathies*, which poses the question of whether the defects present on the roof bolter machine were reasonably likely to trigger an injury-causing event, such as an ignition or explosion, had normal mining operations continued without the intervention of Inspector Meddings. In considering the reasonable likelihood of such an occurrence, the Commission has provided the following framework:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a “confluence of factors” was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of

equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970–71 (May 1990); *Texasgulf*, 10 FMSHRC at 500–03.

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997) (“*Enlow*”).

Based upon the record in this case, the critical questions in applying the framework set forth in *Enlow* are: 1) whether an ignitable or explosive concentration of methane was reasonably likely to exist in the atmosphere surrounding the defects, and 2) whether the defects constituted viable sources of ignition. With respect to the likelihood of an ignitable or explosive concentration of methane occurring in the atmosphere surrounding the defects, the undersigned finds instructive the Commission’s decision in *U.S. Steel Mining Company*, 6 FMSHRC 1866 (Aug. 1984). Among the objections raised on appeal to the Commission in that case, the mine operator argued that an explosive concentration of methane would not have occurred in the area of the cited permissibility violation, thus rendering the likelihood of an explosion so remote that the violation could not be significant and substantial in nature. *U.S. Steel Mining Co.*, 6 FMSHRC at 1868. In rejecting this argument and affirming the designation of the violation as significant and substantial in nature, the Commission relied upon the gassy nature of the subject mine, its history of methane ignitions, and the fact that the mine operator had “offered no evidence to rebut the testimony of the inspector that it was reasonably likely that the violation would contribute to a methane explosion.” *Id.* at 1869. The Commission also rejected the notion that the sufficiency of the mine’s ventilation system at the time of the violation was relevant to the issue, holding that “the fact that the mine’s ventilation was adequate at the time the citation was issued did not diminish the possibility that the violation would result in a serious mine hazard.” *Id.*

In the present proceeding, Inspector Meddings explained that Respondent’s Number 3 Mine liberates 1.2 million cubic feet of methane each day and is subject to five-day spot inspections pursuant to Section 103(i) of the Mine Act, 30 U.S.C. § 813(i).⁸ Tr. 210–11; S’s Ex. 3, 7. The Secretary failed to offer any evidence, however, regarding the frequency that concentrations of methane have reached an ignitable or explosive range at the mine or regarding the number of actual ignitions and explosions of methane that have occurred there. Conversely,

⁸ Section 103(i) of the Mine Act provides, in pertinent part:

Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, “liberation of excessive quantities of methane or other explosive gases” shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period.

30 U.S.C. § 813(i).

Mr. Johnson testified on behalf of Respondent that he has never encountered an explosive range of methane at a working face during his ten years of experience at the mine.⁹ Nevertheless, upon consideration of all the evidence, the undersigned finds that the Secretary has sufficiently demonstrated that an accumulation of methane to ignitable or explosive proportions could reasonably be expected. In so finding, the undersigned attributes great weight to the gassy nature of Respondent's Number 3 Mine and the unquestionable capacity of methane to accumulate rapidly in such mines during the course of operations. On the other hand, Mr. Johnson's claim that he has never encountered an explosive range of methane at a working face of Respondent's Number 3 Mine is not particularly persuasive that such an occurrence is unlikely. Moreover, this testimony was self-serving, and Respondent failed to offer any evidence to corroborate it. Standing alone, it is insufficient to rebut the evidence presented by the Secretary that an ignitable or explosive concentration of methane was reasonably likely to occur.

Turning to the question of whether the cited defects on the roof bolter machine constituted viable sources of ignition, the Secretary offered scant evidence on the issue. Inspector Meddings testified to the general importance of maintaining equipment in permissible condition, explaining, "you get the danger of -- if it's not being maintained in permissible condition, of a mine fire or equipment fire. You know, a panel or a light opening sparking that's not being maintained, catching the equipment itself on fire." Tr. 210. He did not offer any testimony, however, as to the likelihood that the cited defects would generate a spark as mining operations continued or to the factors that would contribute to such an occurrence. To the contrary, Inspector Meddings admitted that the cable stored on the cited cable reel and the cables underlying the defective conduits were fully insulated and intact, and that, in his experience as an inspector, he is not aware of any instances of a fully insulated cable causing an ignition of methane. Tr. 244–26. Respondent also presented contrary evidence on the issue from Mr. Stevens, an electrician who had been employed by Respondent for 11 years at the time of the hearing. Mr. Stevens testified that the outer jacket of the cable stored on the cited cable reel was intact, that the cable was shielded, and that the circuit breaker system on the machine would instantaneously terminate the flow of electricity in the event that the cable sustained damage to the outer jacket, shielding, and inner jacket of the phase lead. Tr. 314, 316–18. He also testified that the cables underlying the defective conduits were not shielded but they were fully insulated and undamaged. Tr. 315–16, 318–19. When questioned by counsel for the Secretary, Mr. Stevens affirmed that each layer of insulation is important to contain voltage running through a

⁹ As discussed above, Respondent also disputes the likelihood of an ignitable or explosive concentration of methane occurring in the entry on the grounds that the record lacks any evidence that the mine's ventilation system was malfunctioning at the time of the inspection and it was required to comply with the ventilation plan governing the mine as operations continued, which would have ensured that ignitable or explosive concentrations of methane did not accumulate. Indeed, according to the regulations governing the ventilation of underground coal mines, an operator is required to develop and follow a ventilation plan designed to control methane and respirable dust in a manner suitable to the conditions and mining system at the mine. 30 C.F.R. § 75.370(a)(1). Thus, the ventilation system presumably was equipped to control the high volume of methane liberated by the mine as operations continued. While Respondent's argument is appealing, the precedent set by the Commission in *U.S. Steel Mining Company* seems to preclude consideration of this factor, and therefore, the undersigned accords little weight to it.

wire. Tr. 326. Nevertheless, he opined that the cited defects did not pose any danger to miners. Tr. 313–16.

Upon consideration, the undersigned finds that the Secretary has failed to carry her burden of demonstrating by a preponderance of the evidence that the cited defects on the roof bolter machine were reasonably likely to spark, thereby generating a source of ignition. While the testimony presented by Inspector Meddings suggests that such an event could happen, it does not establish that it was reasonably likely to actually happen. The Secretary neglected to present any additional evidentiary support, such as evidence of incidents at Respondent's Number 3 Mine or at any other mines where defects similar to those cited in this proceeding have led to an ignition or explosion or evidence showing that the defects were reasonably likely to degrade further and become more hazardous as mining operations continued. The Secretary also failed to identify any legal authorities to support her position. Meanwhile, the evidence proffered by Respondent weighs against a finding that the cited defects were reasonably likely to spark and ignite methane in the surrounding atmosphere. Thus, the undersigned simply is unable to gauge the likelihood that such an event might occur. Accordingly, based upon the record in this case, the undersigned finds that the third element of *Mathies* has not been satisfied and that Respondent's violation of 30 C.F.R. § 75.503 was not significant and substantial in nature.

Turning now to the gravity of the violation, the undersigned finds it to be serious. Inspector Meddings determined that the violation exposed the two miners tasked with operating the roof bolter machine to the danger of injury or illness. This finding is supported by the record. Further, should the cited defects generate a spark and trigger an ignition or explosion of methane, little doubt exists that the resulting injuries could be severe or even fatal. Indeed, Inspector Meddings found that any injuries were reasonably likely to be permanently disabling, and Respondent did not dispute this common sense conclusion. Accordingly, the undersigned finds that the violation subjected at least two miners to the risk of severe injury or fatality and that the proper characterization of the violation is of high gravity.

b. Negligence

Inspector Meddings determined that the violation resulted from a moderate degree of negligence on the part of Respondent, explaining his rationale as follows:

[W]hen I cite anything, you know, I've already reviewed or know pretty much how many times they've been cited as far as permissibility violations. Because the operator normally, like I said, has been cited 20 or 30 or 40 times and it's according to what it is or how many items, you know, this many items, which was wrong with this machine, I felt that moderate was justifiable rather than high negligence.

Tr. 212–13. Thus, Inspector Meddings appears to have weighed the number of defects that he found on the roof bolter machine against the low frequency with which Respondent has been cited for violations of 30 C.F.R. § 75.503 and concluded that these considerations warranted a finding of moderate negligence. This conclusion is supported by the record, and Respondent

does not dispute it. Accordingly, the undersigned finds that Respondent was moderately negligent in violating 30 C.F.R. § 75.503 in this instance.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent's history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 348 violations that became final orders in the preceding 15-month period over the course of 743 days of inspection. Of those 348 violations, 14 consisted of violations of 30 C.F.R. § 75.503. In support of these figures, the Secretary proffered a document entitled "Assessed Violation History Report," which was admitted into evidence as Secretary's Exhibit 8. Respondent did not challenge this evidence.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent's ability to remain in business. Stip. 6. The parties also stipulated that Respondent's Number 3 Mine produced 1,789,927 tons of coal and had 655,991 hours worked in 2008, the year preceding that in which Citation Number 8236514 was issued. Stip. 5. Finally, the regulations promulgated by MSHA provide for a "10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector." 30 C.F.R. § 100.3(f). The Secretary found that Respondent's agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the 10% reduction in the proposed penalty amount. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, the undersigned finds that the appropriate penalty to assess for the violation charged in Citation Number 823586 to be \$400. Further, this Citation shall be modified to injury unlikely and non-S&S.

D. CITATION NUMBER 8236506: ALLEGED VIOLATION OF 30 C.F.R. § 75.400

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 8:15 a.m. on August 20, 2009, Inspector Meddings issued Citation Number 8236506 to Respondent pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), alleging in the "Condition or Practice" section as follows:

Accumulations of combustible material in the form of loose coal and coal fines is being allowed to exist on the active 038-0/040-0 MMU (#2 Section). These accumulations exist along the ribs lines and roadways in several areas starting 80 Feet inby survey spad #26385 located in #4 entry and extending approximately two X-cuts to the working face. Taking in all nine entries and connecting cross cuts. These accumulations measured along the rib 4 to 15 inches in various

locations and 2 to 4 inches in the roadways in various locations across the working section. This mine has a history of methane and last total liberations shown 1,200,000 Cubic feet per 24 hours. The operator has also been put on notice in July, 2009 for excessive 75.403 Violations. A total of (38) 75.403's and (60) 75.400 violations has been issued to this operator in the past 24 months.

A electrical cable violation #8236507 was also issued during this inspection in the cited area. A combination of all these conditions and factors exposes mines to the hazards associated with mine explosions / Fires that would be reasonably likely to result in a permanently disabling injuries.

S's Ex. 4. The Citation further alleges that these conditions constitute a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.400, which provides, "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." *Id.*

As recorded in the Citation, Inspector Meddings determined that Respondent's alleged violation of 30 C.F.R. § 75.400 was reasonably likely to cause injury or illness, that such injury or illness could reasonably be expected to be permanently disabling, and that 13 people would be affected. S's Ex. 4. He also determined that the violation was significant and substantial in nature and that it resulted from a moderate degree of negligence on the part of Respondent. *Id.*

For the alleged violation, the Secretary proposed the assessment of a civil penalty in the amount of \$4,689.00.

2. LIABILITY

Upon consideration, the undersigned finds that the Secretary has demonstrated by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.400 as charged in the Citation. According to the field notes and testimony of Inspector Meddings, on August 20, 2009, he observed accumulations of combustible materials in the form of loose coal and coal fines in numerous locations along the ribs and roadways in the nine entries and connecting cross cuts comprising the Number 2 section of Respondent's Number 3 Mine. S's Ex. 7; Tr. 214-16. He measured the accumulations and found that they ranged in depth from four to 15 inches along the ribs and two to four inches in the roadways. Tr. 215-16; S's Ex. 4, 7. He also found between the Number 8 and 9 entries that Respondent's agents had "punched that break through" and failed to "clean the gob up in there," resulting in an accumulation of material the depth of which was three feet. Tr. 216; S's Ex. 7. Inspector Meddings depicted the specific locations of the accumulations in a diagram that he sketched in his field notes. Tr. 215; S's Ex. 7.

At the hearing, Mr. Johnson acknowledged that accumulations of coal were present in those areas of the Number 2 section where he accompanied Inspector Meddings and that he did not have any reason to disagree with Inspector Meddings' diagram of the accumulations. Tr. 345. While Mr. Johnson disputed the extent of the accumulations, Tr. 334-37, 346-47, in its Post-Hearing Brief, Respondent does not contest the alleged violation 30 C.F.R. § 75.400. R's

Br. at 2. The uncontroverted evidence presented by the Secretary in support of the alleged violation of 30 C.F.R. § 75.400 is sufficient to establish the fact of the violation. Accordingly, the undersigned finds that Respondent is liable for violating 30 C.F.R. § 75.400 on August 20, 2009, by allowing accumulations of combustible materials to exist along the ribs and roadways of the entries and connecting cross cuts of the Number 2 section.

3. PENALTY

a. Gravity and Significant and Substantial Nature of the Violation

i. Arguments of the Parties

Citing the testimony of Inspector Meddings as support, the Secretary argues that a cable in the area that was not being properly maintained could reasonably be expected to ignite the accumulations of coal present in the Number 2 section, that a fire “could cause injuries ranging from minor smoke inhalation to fatalities,” that permanently disabling injuries “were reasonably likely to occur because of the extent of the combustible material and the exposure to an ignition source,” and that 13 miners would be affected. S’s Br. at 9 (citing Tr. 218–19). The Secretary relies upon the same considerations to argue that the violation was significant and substantial in nature as well. S’s Br. at 15 (citing Tr. 218–19; S’s Ex. 4).

Respondent argues that “the Secretary’s posited ignition source is not a plausible one” and that, without it, the Secretary has not met the “confluence of factors” standard that applies in this proceeding. R’s Br. at 7–9. As support for its position, Respondent first notes that the Secretary relies solely upon the opinion of Inspector Meddings with respect to this issue, despite his lack of electrical certifications. R’s Br. at 7 (citing S’s Br. at 8; Tr. 258). Respondent then points to the testimony of its witness, Mr. Johnson, the Maintenance Manager at Respondent’s Number 3 Mine who previously served as the Chief Electrician on the day shift at the mine and who is certified by the federal and state government as an underground and surface mining electrician for low, medium, and high voltages. R’s Br. at 8 (citing Tr. 330–32). Respondent contends that Mr. Johnson’s testimony establishes that the particular type of cable cited by the Secretary as an ignition source does not pose a risk of sparking should it sustain any damage, because the circuit breaker system would terminate the flow of electricity within a quarter of a second. R’s Br. at 8 (citing Tr. 340). Respondent also notes Mr. Johnson’s testimony that the cable was between 100 and 120 feet from the cited accumulations. R’s Br. at 8 (citing Tr. 339). Based upon these considerations, Respondent argues that the Secretary has failed to prove a confluence of factors necessary to justify the characterization of the violation as reasonably likely to result in an injury and significant and substantial in nature. R’s Br. at 8–9.

ii. Discussion

As previously discussed, in order to establish the significant and substantial nature of a violation, the Secretary is required to demonstrate four elements under *Mathies*: 1) that the underlying violation of a mandatory safety standard occurred; 2) that the violation contributed to a discrete safety hazard; 3) that the hazard in question is reasonably likely to result in an injury; and 4) that the injury in question is reasonably likely to be of a reasonably serious nature. 6

FMSHRC 1 (Jan. 1984). Having already found that Respondent violated 30 C.F.R. § 75.400 as charged, the first element of *Mathies* is satisfied. As for the second element, Inspector Meddings determined that the accumulations of coal that he observed, coupled with the violative condition of an electrical cable that he also cited on August 20, 2009, and the amount of methane liberated by the mine, exposed miners to the hazards associated with a fire or explosion. S's Ex. 4; Tr. 214–15. With respect to the danger of an explosion, Mr. Meddings testified:

[I]f the operator continues to keep loose material like this and the constant machinery running over it and grinds it up, and then they grind it into the floor of the mine and then they keep advancing, and then here you've got a lot of combustible material outby them, which would feed an explosion if one was to occur strong enough to pick it up.

Tr. 214. Respondent did not dispute the alleged hazards. Abundant case law supports the conclusion that accumulations of coal contribute to the discrete safety hazard that these combustible materials would encounter a source of ignition and spark a fire or explosion, or that the combustible materials would propagate an ignition or explosion originating elsewhere in the mine, such as an ignition of methane at the mine face, and increase the force of that event. *See, e.g., Old Ben Coal Co.*, 1 FMSHRC 1954, 1956–57 (Dec. 1979); *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985); *Utah Power & Light Co.*, 12 FMSHRC 965, 970 (May 1990); *Mid-Continent Res.*, 16 FMSHRC 1218, 1222 (June 1994). Further, little doubt exists that any injury resulting from such a hazard could be severe or even fatal. Thus, the second and fourth elements of *Mathies* have also been met.

The undersigned now turns to the third element of *Mathies*, which poses the question of whether the accumulations of coal present in the Number 2 entry were reasonably likely to trigger an injury-causing event, such as an ignition or explosion, had normal mining operations continued without Inspector Meddings' intervention. In considering the reasonable likelihood of such an occurrence, the Commission has provided the following framework:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a “confluence of factors” was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970–71 (May 1990); *Texasgulf*, 10 FMSHRC at 500–03.

Enlow, 19 FMSHRC 5, 9 (Jan. 1997).

Applying the framework set forth in *Enlow* to the record in this case, the undersigned finds that a number of factors increased the likelihood of an ignition or explosion. First, the record reflects that the accumulations were extensive. The evidence presented by both Inspector Bell and Mr. Johnson establish that accumulations of combustible materials in the form of loose coal and coal fines were present in numerous locations along the ribs and roadways of the nine

entries and connecting cross cuts comprising the Number 2 section. S's Ex. 7; Tr. 214–16, 345. The undersigned credits the testimony and contemporaneous field notes of Inspector Meddings as to the precise locations and depths of these accumulations. While Mr. Johnson disputed this point, he acknowledged that he did not accompany Inspector Meddings through each entry of the Number 2 section where Inspector Meddings identified an unlawful accumulation and that he did not observe Inspector Meddings measure the depths of the accumulations. Tr. Tr. 334–37, 345–47. Thus, he very well could have overlooked some of the accumulations observed by Inspector Meddings, and his estimates as to their depths are undoubtedly less reliable than the measurements taken by Inspector Meddings. Accordingly, the undersigned finds the accumulations to be as extensive as described by Inspector Meddings at the hearing and in his field notes.

While the accumulations of coal alone constituted a significant fuel source for an ignition or explosion, the undersigned also adopts the findings above that an ignitable or explosive concentration of methane was reasonably likely to occur as mining operations continued given the gassy nature of the mine and the capacity of methane to accumulate rapidly in such mines during the course of operations. This factor undoubtedly heightened the risk of an ignition or explosion in the Number 2 section.

The critical question that remains to be considered is whether the defective electrical cable identified as an ignition source by Inspector Meddings was reasonably likely to arc or spark, thereby producing a source of ignition for either the unlawful accumulations of coal or the excessive concentration of methane that was reasonably likely to occur. Once again, the Secretary offered scant evidence on this issue. In particular, the Secretary neglected to introduce into evidence a copy of the citation addressing the defective cable, and Inspector Meddings explained at the hearing only that the electrical cable had “a gap in it or something was wrong with the cable.” Tr. 217. His contemporaneous field notes are more elaborative, stating, “A splice 27” in length 13.5’ from the arm of the Joy Continuous Miner [illegible]. An opening exist [sic] at the end of the splice 1/2” long around the entire cable exposing the inner phase leads, ground lead, and monitor.” S's Ex. 7. When questioned by Respondent's counsel, Inspector Meddings affirmed that the outer jacket of the cable had sustained damage but that “[t]he cable was still covered with shielding” and “[t]he inner conductors were still insulated.” Tr. 252. He also admitted that he is not aware of any instances of cables in that condition igniting coal. Tr. 252.

In support of its position that the defective electrical cable did not constitute a feasible ignition source, Respondent presented the testimony of Mr. Johnson. An employee of Respondent for 23 years as of the date of the hearing, Mr. Johnson explained that he currently serves as the Maintenance Manager at Respondent's Number 3 Mine and is responsible for overseeing the maintenance and repair of equipment at the mine, but that he was the chief electrician on the day shift at the time Inspector Meddings issued the subject Citation. Tr. 330–31. As for his credentials on the subject of electrical systems, Mr. Johnson testified that he holds state and federal certifications for both underground and surface mines and for low, medium, and high voltages. Tr. 331–32. When questioned about the defective electrical cable identified by Inspector Meddings as an ignition source, Mr. Johnson first described the structure of the cable, testifying, “Well, you got your conductors and then you got your insulated conductors, and then

you got semiconductive tape around the leads, then shielding on the lead which is connected to the miner [machine]. The shielding is grounded to the power center, to the machine itself.” Tr. 339. Mr. Johnson further testified that the field notes of Inspector Meddings reflect that the cable was approximately 100 to 120 feet from the cited accumulations of coal. Tr. 339. Finally, Mr. Johnson opined that the cable did not pose a risk of igniting the accumulations:

For one thing, it was too far away to even pose anything. Plus the shielded cable, it’s shielded to protect any kind of arcing. If it does, it goes to ground. Takes 15 amps or less to knock the breaker, and 45 or less volts, so that ain’t going to create no spark. And it knocks within probably three to five cycles, which is probably less than quarter of a second.

Tr. 340.¹⁰

Upon consideration, the undersigned finds that the Secretary has failed to carry her burden of demonstrating by a preponderance of the evidence that the defective electrical cable was reasonably likely to arc or spark, thereby generating a source of ignition. While the field notes of Inspector Meddings describe the defective condition of the cable, the Secretary failed to offer any evidence that this condition rendered the cable capable of arcing or sparking, let alone that such an event was reasonably likely to occur. To the contrary, Inspector Meddings admitted that he is not aware of any instances of a cable in the same condition acting as an ignition source for coal. The Secretary also neglected to present any evidence that the cable was reasonably likely to degrade further and become more hazardous as mining operations continued, or to identify any legal authorities to support her position. Further, Respondent countered the sparse evidence presented by the Secretary with the testimony of Mr. Johnson, the opinion of whom is deemed to be credible given his demonstrated expertise on electrical matters. Thus, based upon the record in this case, the undersigned finds that the Secretary has failed to establish that the defective electrical cable constituted a viable source of ignition. As the Secretary identified only the cable as a potential ignition source, the undersigned finds that the Secretary has failed to establish that the accumulations of coal present in the Number 2 entry were reasonably likely to result in an injury-causing event. Accordingly, the third element of *Mathies* has not been met, and Respondent’s violation of 30 C.F.R. § 75.400 is deemed not to have been significant and substantial in nature.

Nevertheless, the violation was serious. As noted above, the Commission has advised that “[t]he focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The undisputed testimony of Inspector Meddings establishes that 13 miners were present on the section at the

¹⁰ Mr. Johnson attempted to bolster his testimony by explaining that he sought the opinion of an electrical engineer, who allegedly agreed with his assessment. Tr. 340. While hearsay may be admitted under the procedural rules governing this proceeding set forth at 29 C.F.R. § 2700.63(a), it is not required to be. The hearsay evidence regarding Mr. Johnson’s conversation with the unnamed electrical engineer is not inherently reliable, and the Secretary lacks any means of confronting this individual and challenging his conclusions. Therefore, the undersigned will not consider this evidence.

time he issued the Citation, Tr. 218, and the presence of the accumulations undoubtedly exposed these individuals to a risk of injury in the event of an ignition or explosion. With regard to the severity of this potential injury, the undersigned accepts as credible Inspector Meddings' conclusion that permanently disabling injuries were reasonably likely to result should an ignition or explosion occur. Inspector Meddings reasoned that in the event of a fire, "the least you'll get by with is somebody just gets smoke inhalation and misses a few days from trying to fight a fire. The worst part it would be a fatal mine fire and people get trapped and can't get out and get killed, so I took the middle of the road." Tr. 218–19. Respondent did not offer any evidence to rebut this common sense conclusion. Accordingly, the undersigned finds that the violation subjected 13 miners to the risk of severe injury or fatality. Given this finding, the proper characterization of the violation is of high gravity.

b. Negligence

Inspector Meddings determined that Respondent was moderately negligent in violating 30 C.F.R. § 75.400, reasoning, "I couldn't mark it low, as the amount of citations and the amount and extent of conditions here. Moderate is what I marked it. I probably could have justified high easily, but I just marked it moderate." Tr. 219. Respondent did not dispute Inspector Meddings' characterization.

Based upon the record in this case, the undersigned finds that Respondent was, in fact, highly negligent in allowing the cited accumulations to exist. First, as found above, the accumulations were extensive. In addition, as Inspector Meddings recorded in the body of the Citation, "The operator has . . . been put on notice in July, 2009 for excessive 75.403 Violations.¹¹ A total of (38) 75.403's and (60) 75.400 violations has been issued to this operator in the past 24 months." S's Ex. 4. Respondent did not dispute this evidence. Thus, Respondent had received repeated warnings of unlawful accumulations of combustible materials at Number 3 Mine in the two years preceding the issuance of the subject Citation. Despite being on notice to prevent such violations from occurring, Respondent failed to take any steps to address the accumulations at issue here. In fact, the testimony of Mr. Johnson suggests that Respondent's agents had already cleaned the cited areas and simply left behind the accumulations observed by Inspector Meddings. *See* Tr. 335–37, 347. The record does not contain any suggestion that Respondent's agents intended to return to the cited areas and remove the accumulations.¹²

¹¹ At the time Inspector Meddings issued Citation Number 8236506, the regulations at 30 C.F.R. § 75.403 provided, in pertinent part:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum.

30 C.F.R. § 75.403.

¹² Indeed, according to Mr. Johnson, Respondent's agents had already applied rock dust in the area. Tr. 335. He testified, however, that "it had been real black," Tr. 335, which calls into

Therefore, the accumulations of loose coal and coal fines would have persisted uncorrected had Inspector Meddings not intervened.

The considerations discussed above undoubtedly support a finding of high negligence, and the undersigned is hard-pressed to find in the record any evidence of mitigating circumstances. When asked by counsel for the Secretary whether he had considered any mitigating factors in characterizing the degree of negligence shown by Respondent, Inspector Meddings responded, "I couldn't see, you know, that I tried to look -- I tried to ask around, you know, why that condition started, and I tried to see what I could do to help the operator do this. This right here was just operator just failed to clean it up." Tr. 219. This largely non-responsive answer fails to elucidate whether any mitigating circumstances existed. Accordingly, the undersigned finds the violation resulted from a high degree of negligence on the part of Respondent.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent's history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 334 violations that became final orders in the preceding 15-month period over the course of 720 days of inspection. Of those 334 violations, 19 consisted of violations of 30 C.F.R. § 75.400. In support of these figures, the Secretary proffered a document entitled "Assessed Violation History Report," which was admitted into evidence as Secretary's Exhibit 8. Respondent did not challenge this evidence.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent's ability to remain in business. Stip. 6. The parties also stipulated that Respondent's Number 3 Mine produced 1,789,927 tons of coal and had 655,991 hours worked in 2008, the year preceding that in which Citation Number 8236514 was issued. Stip. 5. Finally, the regulations promulgated by MSHA provide for a "10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector." 30 C.F.R. § 100.3(f). The Secretary found that Respondent's agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the 10% reduction in the proposed penalty amount. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, the undersigned finds that the appropriate penalty to assess for the violation charged in Citation Number 8236506 is \$3,750. Further, this Citation shall be modified to injury unlikely, non-S&S, and high negligence.

question whether the materials met the requirements of 30 C.F.R. § 75.403. Inspector Meddings testified that he did not sample the rock dust anywhere in the section, however. Tr. 253.

E. CITATION NUMBER 8236514: ALLEGED VIOLATION OF 30 C.F.R. § 75.503

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 2:07 a.m. on August 27, 2009, Inspector Meddings issued Citation Number 8236514 to Respondent pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), alleging in the “Condition or Practice” section as follows:

The DBT Continuous Mining Machine CO #0176 being used on #4 Section is not being maintained in permissible condition. An opening exist of .025 inch in the right side tram panel top left handed side. The maximum allowable opening is .004 inch to be considered permissible. This mine produces over 1.2 million Cubic Feet of Methane in a 24 hour period and produces coal an average two shifts per day five days per week. This condition exposes miners to the hazards associated with methane explosions that would result in permanently disabling injuries.

S’s Ex. 5. The Citation further alleges that the cited condition constitutes a violation of 30 C.F.R. § 75.503. *Id.* As noted above, this provision provides, “The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.” 30 C.F.R. § 75.503.

Inspector Meddings determined that Respondent’s alleged violation of 30 C.F.R. § 75.503 was reasonably likely to cause injury or illness, that such injury or illness could reasonably be expected to be permanently disabling, and that 13 people would be affected. S’s Ex. 5. He also determined that the violation was significant and substantial in nature and that it resulted from a low degree of negligence on the part of Respondent. *Id.*

For the alleged violation, the Secretary proposed the assessment of a civil penalty in the amount of \$1795.00.

2. LIABILITY

Upon consideration, the undersigned finds that the Secretary has demonstrated by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.503 as charged in the Citation. According to the field notes and testimony of Inspector Meddings, he inspected a continuous miner machine located in the Number 4 section on August 27, 2009, and detected a gap in the right side tram panel that measured 0.025 inches, which exceeded the limit of 0.004 considered to be permissible. Tr. 221–22; S’s Ex.7. Mr. Rowe acknowledged the presence of the impermissible gap at the hearing, Tr. 298, and Respondent does not contest the alleged violation of 30 C.F.R. § 75.503 in its Post-Hearing Brief. R’s Br. at 2, 9. The uncontroverted evidence presented by the Secretary in support of the alleged violation of 30 C.F.R. § 75.503 is sufficient to establish the fact of the violation. Accordingly, the undersigned finds that Respondent is liable for violating 30 C.F.R. § 75.503 on August 27, 2009, by failing to maintain

the continuous miner machine in the Number 4 section in permissible condition, as charged in the Citation.

3. PENALTY

a. Gravity and Significant and Substantial Nature of the Violation

i. Arguments of the Parties

Citing the testimony of Inspector Meddings as support, the Secretary argues that “[a] spark could cause a methane explosion or mine fire with fatalities or serious burns,” that permanently disabling injuries “were reasonably likely to occur because the miner was actually in use and cutting coal,” and that the 13 miners working on the Number 4 section would be affected by the violative condition. S’s Br. at 10 (citing Tr. 222–23). Turning to the designation of the violation as significant and substantial in nature, the Secretary argues that the violation contributed to a discrete safety hazard, “because the condition of the equipment was not permissible” and the operation of the continuous miner machine “would reasonably likely lead to a serious injury to the miners being exposed to a methane explosion resulting from a spark created by a continuous miner.” S’s Br. at 15 (citing Tr. 212, 223; S’s Ex. 5).

Respondent challenges the characterization of the violation as reasonably likely to result in an illness or injury and as significant and substantial in nature. R’s Br. at 9–11. Arguing that the Secretary has not met the “confluence of factors” standard that applies to this determination, Respondent contends that the testimony of Mr. Johnson and Mr. Rowe establish that the components behind the cited panel “are not capable of arcing, sparking, or otherwise presenting an ignition source for methane,” because “no moving components are a part of the panel and . . . the components are individually sealed off from one another.” R’s Br. at 9–11 (citing Tr. 298–99, 343–44). Thus, Respondent contends, the cited condition did not constitute a source of ignition. R’s Br. at 10. Seeking to discredit Inspector Meddings, Respondent notes that he admitted that he lacked any electrical certifications or real knowledge of the components behind the cited panel. R’s Br. at 9 (citing Tr. 258). Finally, Respondent argues that “the likelihood of a potential fuel source in the form of methane was also very low,” given that Inspector Meddings did not detect any appreciable levels of methane at the time of his inspection, Mr. Johnson has never found an explosive range of methane at or around the working face of Respondent’s Number 3 Mine in his ten years of experience working there, and the mine’s ventilation system was working properly that day. R’s Br. at 10–11 (citing Tr. 256, 344, 348, 351). Respondent also disputes the Secretary’s reliance upon the average volume of methane liberated by the mine to demonstrate the likelihood that an explosive range of methane was reasonably likely to form. R’s Br. at 11.

ii. Discussion

As previously discussed, in order to establish the significant and substantial nature of a violation, the Secretary is required to demonstrate four elements under *Mathies*: 1) that the underlying violation of a mandatory safety standard occurred; 2) that the violation contributed to a discrete safety hazard; 3) that the hazard in question is reasonably likely to result in an injury;

and 4) that the injury in question is reasonably likely to be of a reasonably serious nature. 6 FMSHRC 1 (Jan. 1984). The Commission has emphasized that designations of permissibility violations as significant and substantial “must be based on the particular facts surrounding the violation, including the nature of the mine involved.” *Texasgulf*, 10 FMSHRC 498, 501 (Apr. 1988). The Commission thereby recognized that “the individual nature of a mine with regard to its methane liberations and its history of previous emissions and explosions has a bearing on the validity of an S&S finding.” *Knox Creek*, 2010 WL 561997, *45 (Dec. 27, 2010) (ALJ).

Applying the foregoing principles to the record in this case, the undersigned finds that the first element of *Mathies* is satisfied, because the fact of the violation has been established. The second element is also met. Inspector Meddings determined that the impermissible gap present on the continuous miner machine’s right side tram panel exposed the 13 miners working in the section to the hazard of a methane-fueled fire or explosion. Tr. 221; S’s Ex. 5. He explained that the purpose of the panel is to ensure that any ignition that may occur inside the compartment it encloses will not escape into the mine atmosphere and trigger a larger ignition or explosion:

[T]he panel was not designed to keep methane out. The panel will allow methane in. The panel is designed to keep -- if methane gets into the panel, to keep the flame path from coming out of the panel. That’s where you get the four-thousandths gap, you’re allowed up to four-thousandths. Anything bigger than that, when the miner is operating, cutting down coal, the coal is liberated a lot more, especially when they’re cutting coal. So there’s going to more methane liberating in and around them panels. So like I said, the panel is not designed to keep methane out; it’s designed to keep the flame path in.

Tr. 271. Respondent did not dispute the alleged hazard. The undersigned agrees and finds that the violation contributed to the discrete safety hazard of methane entering the compartment enclosed by the right side tram panel, the electrical components behind the panel arcing or sparking and thereby igniting the methane, and the resulting flame traveling out of the compartment through the impermissibly wide gap and triggering a larger ignition or explosion if the concentration of methane in the mine atmosphere fell within the ignitable or explosive range. Further, little question exists that any injury resulting from such a hazard could be severe or even fatal. Thus, the fourth element of *Mathies* is also met.

The critical question is whether this hazard was reasonably likely to result in an injury-causing event had normal mining operations continued, thereby satisfying the third element of *Mathies*. As argued by Respondent, the Commission has examined whether the “confluence of factors” necessary to cause an ignition or explosion was present in evaluating the reasonable likelihood of such occurrence, “including a sufficient amount of methane in the atmosphere surrounding the impermissible gaps and ignition sources.” *Texasgulf*, 10 FMSHRC at 501.

With respect to the quantity of methane present in the atmosphere, Inspector Meddings did not measure the level of methane at the continuous miner machine on the date of the inspection because, as he explained, he performed the inspection during the mine’s maintenance shift when the mine does not produce any coal, thereby allowing Respondent’s agents to back the continuous miner machine away from the face and “pull all the shields off of it” in preparation

for his inspection, without hindering production. Tr. 256–57. In the normal course of events, however, the continuous miner machine reasonably could have been expected to move back to the mine face and resume operation during the next production shift. The record does not contain any suggestion that Respondent would have observed and corrected the impermissible gap prior to that time. Thus, the question for the undersigned to consider is whether the continuous miner machine was reasonably likely to encounter an ignitable or explosive concentration of methane after it resumed operation at the mine face. With respect to this issue, the undersigned again adopts the findings above that an ignitable or explosive concentration of methane was reasonably likely to occur, given the gassy nature of the mine and the capacity of methane to accumulate rapidly in such mines during the course of operations.

The undersigned now considers the likelihood that the electrical components contained by the right side tram panel on the continuous miner machine would arc or spark, thereby producing a source of ignition. Upon consideration of the evidence presented by the parties, the undersigned finds that the Secretary has failed to carry her burden in this regard. The Secretary rested solely on the finding of Inspector Meddings that the impermissible gap exposed miners to the hazard of fire or explosion, but Inspector Meddings did not offer any basis for his belief that the electrical components enclosed by the panel would generate a source of ignition. To the contrary, he admitted that he lacks any knowledge as to the nature of these components or whether they were capable of arcing or sparking. Tr. 221, 258. He also admitted that he lacks expertise on electrical matters. Tr. 258. These considerations significantly undermine his conclusion that an ignition source existed. In addition, the testimony offered by Respondent’s witnesses compels a finding that the components behind the right side tram panel were not capable of arcing or sparking and, therefore, that the impermissible gap did not constitute a feasible source of ignition. Mr. Rowe explained that these particular components were incapable of arcing or sparking and that each component was sealed in its own container within the compartment. Tr. 298–99. Mr. Johnson confirmed this testimony, testifying that the absence of moving parts precluded the components from arcing or sparking. Tr. 343, 348. Given their past and current responsibilities at the mine, both Mr. Rowe and Mr. Johnson are found to possess considerable expertise on electrical matters and the cited continuous miner machine, which lends credibility to their determinations. Therefore, the undersigned finds that the Secretary has failed to demonstrate by a preponderance of the evidence that the electrical components were reasonably likely to arc or spark and thereby result in an ignition of methane. Accordingly, the third element of *Mathies* has not been met, and the violative condition of the continuous miner machine was not significant and substantial.

Nevertheless, the undersigned finds the violation to have been serious. As noted above, the Commission has advised that “[t]he focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). While Inspector Meddings testified that 13 miners were present on the section at the time of his inspection, he failed to identify the number of miners present on the section during production shifts, when operation of the cited continuous miner machine would resume. At a minimum, however, the violation subjected the operator of this equipment to the risk of injury in the event of an ignition or explosion. With regard to the severity of this potential injury, the undersigned accepts as credible Inspector Meddings’ conclusion that permanently

disabling injuries were reasonably likely to result should the violation result in an ignition or explosion. Inspector Meddings reached this conclusion by weighing the “best case scenario,” which would be that an ignition results and causes burn injuries to one person, and the “worst case scenario,” which would be an explosion. Tr. 223. Respondent did not offer any evidence to rebut this common sense conclusion. Accordingly, the undersigned finds that the violation subjected at least one miner to the risk of severe injury or fatality. Given this finding, the proper characterization of the violation is of high gravity.

b. Negligence

Inspector Meddings determined that the violation resulted from a low degree of negligence because he typically finds multiple violative conditions when inspecting the permissibility of equipment and the impermissible gap that he found in the right side tram panel was the only issue that he detected on the continuous miner machine. Tr. 223–24; S’s Ex. 5, 7. At the hearing, he explained, “[A]s many things that can go wrong with this miner, this is the only one I found. So I made a low negligence [designation].” Tr. 224. Respondent did not dispute this finding. Upon consideration, the undersigned agrees and finds that the inconspicuous nature of the impermissible gap and the absence of any other violative conditions on the continuous miner machine warrant a finding of low negligence.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent’s history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 334 violations that became final orders in the preceding 15-month period over the course of 721 days of inspection. Of those 334 violations, 12 consisted of violations of 30 C.F.R. § 75.503. In support of these figures, the Secretary proffered a document entitled “Assessed Violation History Report,” which was admitted into evidence as Secretary’s Exhibit 8. Respondent did not challenge this evidence.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent’s ability to remain in business. Stip. 6. The parties also stipulated that Respondent’s Number 3 Mine produced 1,789,927 tons of coal and had 655,991 hours worked in 2008, the year preceding that in which Citation Number 8236514 was issued. Stip. 5. Finally, the regulations promulgated by MSHA provide for a “10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector.” 30 C.F.R. § 100.3(f). The Secretary found that Respondent’s agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the 10% reduction in the proposed penalty amount. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, the undersigned finds that the appropriate penalty to assess for the violation charged in Citation Number 8236514 to be \$200. Further, this Citation shall be modified to injury unlikely and non-S&S.

F. CITATION NUMBER 8236515: ALLEGED VIOLATION OF 30 C.F.R. § 75.370(a)(1)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 5:15 a.m. on August 28, 2009, Inspector Meddings issued Citation Number 8236515 to Respondent pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), alleging in the “Condition or Practice” section as follows:

The approved ventilation plan is not being followed on the active 035-0/039-0 MMU. No measurement could be obtained behind the line curtain in No. 2 entry using a calibrated anemometer. Also no positive air movement could be detected using chemical smoke. The approved ventilation plan requires 1,000 CFM be maintained in all idle/bolted faces. This entry is approximately 27 feet deep and 7.5 Ft. in height, 0.2% methane was detected in this face during this inspection. This mine has a history of methane and liberates over 1.2 Million Cubic feet of methane in a 24 hours period by the last total liberation bottle sample taken. The foreman’s Date, Time and initials are in the area within 22 minutes of this citation was issued. This mine has been issued 49 Violations of failing to follow the approved ventilation plan within the past 24 months.

S’s Ex. 6. The Citation further alleges that Respondent’s failure to comply with the approved ventilation plan constitutes a violation of 30 C.F.R. § 75.370(a)(1), which requires operators to develop and follow a ventilation plan designed to control methane and respirable dust in a manner suitable to the conditions and mining system at the mine, subject to the approval of the district manager. *Id.*

Inspector Meddings determined that Respondent’s alleged violation of 30 C.F.R. § 75.370(a)(1) was unlikely to cause injury or illness but that any such injury or illness could reasonably be expected to be permanently disabling. S’s Ex. 6. He further determined that 11 people would be affected by the alleged violation. *Id.* Finally, he determined that the violation was not significant and substantial in nature and that Respondent’s degree of negligence in committing the violation was high. *Id.*

As a civil penalty for this alleged violation, the Secretary proposes the assessment of \$3,143.00.

2. LIABILITY

Upon consideration, the undersigned finds that the Secretary has demonstrated by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.370(a)(1) as charged in the Citation. As noted above, the revised basic ventilation plan governing Respondent's Number 3 Mine reflects that Respondent is required to maintain a minimum air velocity of 1000 CFM at the "[i]nby end of line curtain[s] in idle places." S's Ex. 9; *see also* Tr. 225. Inspector Meddings presented ample evidence that he was unable to detect any air velocity behind the line curtain in the Number 2 entry on August 28, 2009, in contravention of the plan. S's Ex. 7; Tr. 226. Respondent did not offer any contradictory evidence at the hearing. Rather, Mr. Rowe testified that he lacked any knowledge of the circumstances surrounding the Citation, explaining that he did not accompany Inspector Meddings to the face of the entry and that he generally waits at the mouth of the entry during inspections. Tr. 295–97. Further, Respondent does not contest the alleged violation of 30 C.F.R. § 75.370(a)(1) in its Post-Hearing Brief. R's Br. at 2. The uncontroverted evidence presented by the Secretary in support of the alleged violation of 30 C.F.R. § 75.370(a)(1) is sufficient to establish the fact of the violation. Accordingly, the undersigned finds that Respondent is liable for violating 30 C.F.R. § 75.370(a)(1) on August 28, 2009, by failing to maintain 1000 CFM of air flow in the Number 2 entry of the Number 4 section, as required by its approved ventilation plan.

3. PENALTY

a. Gravity of the Violation

In her Post-Hearing Brief, the Secretary cites the testimony of Inspector Meddings and the Citation in support of the gravity of the violation. S's Br. at 12 (citing Tr. 228–30; S's Ex. 6). Respondent does not dispute Inspector Meddings' characterization of this aspect of the violation.

Upon consideration, the undersigned finds the violation to be serious. While Inspector Meddings measured the concentration of methane present in the Number 2 entry of the section to be only 0.2 percent, well below the concentration necessary to ignite or explode, he testified that a deficient level of air flow in a mine, such as the one that he detected, can lead to the accumulation of methane to explosive concentrations. Tr. 225–30; S's Ex. 6, 7. Respondent did not challenge this assertion. Given the gassy nature of Respondent's Mine and the deficient flow of air to the entry, methane reasonably could have been expected to accumulate rapidly without detection, even though coal was not being cut at the time.

The record, however, does not disclose the presence of an ignition source for the methane which would have warranted a finding that an injury-causing event was reasonably likely to occur. No equipment was present in the Number 2 entry during the inspection, and while Inspector Meddings testified that equipment was "tramping around the section," he acknowledged that equipment was not permitted to enter inby the last open crosscut unless methane levels had first been measured. Tr. 260–61. Even if this precautionary measure was not considered, the Secretary failed to introduce any evidence as to how the particular equipment that was "tramping around the section" would generate a source of ignition once in the Number

2 entry. In the absence of an ignition source, an injury-causing event was unlikely to occur as a result of the violation. Nevertheless, should an ignitable or explosive concentration of methane have formed and ignited, the resultant injuries undoubtedly could have been severe. As Inspector Meddings testified, “I evaluated permanently disabling. I looked at it, if this was to continue and then explosive mixture would be allowed to accumulate in it, and then it would have ignited and, again, too, I normally -- I’ll take the middle of the road. Worst case scenario is something like Upper Big Branch. Best case scenario is just somebody gets burned. I marked it middle of the road” Tr. 229. He also testified that the 11 miners present on the section at the time of his inspection would be impacted by such an occurrence. Tr. 230. The undersigned accepts these conclusions as credible and, based upon the foregoing considerations, finds the proper characterization of the violation to be of high gravity.

b. Negligence

The Secretary cites the testimony of Inspector Meddings as support for the designation of Respondent’s negligence as high, noting that Inspector Meddings observed that the foreman had verified that an adequate examination had been performed in the cited area but that “[t]he examination was not completed correctly, because there was no positive air flow in the area.” S’s Br. at 12 (citing Tr. 230). Respondent counters that Inspector Meddings’ investigation on this point “is simply not sufficient to justify a finding that the company engaged in high negligence simply because the air volume was reportedly different twenty-two minutes after an examiner had been through the area.” R’s Br. at 12. As support for this position, Respondent relies upon the testimony of Inspector Meddings that he could not recall whether a rock had dislodged the line curtain in the entry, that he had “[n]o idea” when the line curtain had become dislodged, and that he neglected to ask the section foreman whether the line curtain was hung properly at the time of the examination, even though it would have been “some good information.” R’s Br. at 11–12 (citing Tr. 262). On these grounds, Respondent requests that the undersigned assess its negligence as moderate, rather than high. R’s Br. at 12.

The undersigned finds Respondent’s position persuasive. To demonstrate that the violation resulted from a high degree of negligence on the part of Respondent, the Secretary rested primarily on the belief of Inspector Meddings that the examination had not been performed properly, and the record reflects that the basis for this belief was simply that he detected a violative condition during his inspection. As noted above, “[t]he mere fact that conditions existed at the time of the inspection is insufficient evidence from which to infer the conditions existed at the time of the [preshift] examination.” *Cemex, Inc.*, 32 FMSHRC 1897, 1901 (Dec. 27, 2010) (ALJ). While only 22 minutes had elapsed between the examination and inspection, conditions in a coal mine can change quickly and unexpectedly, a point conceded by Inspector Meddings at the hearing. Tr. 262. Inspector Meddings did not deny that a rock could have dislodged the line curtain directing air to the entry after the examination, thereby disrupting the velocity of air at the face. Absent any other evidence demonstrating that the examination of the Number 2 entry was deficient or that the lack of air flow could not have developed between the examination and inspection, the record supports a finding that the examination was adequate, which warrants a finding of low negligence. On the other hand, Respondent had received repeated warnings of its failure to comply with the ventilation plan governing Number 3 Mine in the two years preceding the issuance of the subject Citation. In particular, Inspector Meddings

noted that Respondent had been cited for 49 violations of the ventilation plan during that period. S's Ex. 6; Tr. 226–27. While he admitted on cross-examination that he did not confirm that each of those citations had become final orders, he explained that representatives of MSHA confer with Respondent as a consequence of the citations having been issued on ways to improve compliance. Tr. 226–27, 263–67. Thus, Respondent clearly was on notice that greater efforts were necessary to comply with the ventilation plan. Weighing these considerations, the undersigned finds that Respondent exhibited a moderate degree of negligence in committing the violation charged in this Citation.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent's history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 334 violations that became final orders in the preceding 15-month period over the course of 718 days of inspection. Of those 334 violations, 20 consisted of violations of 30 C.F.R. § 75.370(a)(1). In support of these figures, the Secretary proffered a document entitled "Assessed Violation History Report," which was admitted into evidence as Secretary's Exhibit 8. Respondent did not challenge this evidence.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent's ability to remain in business. Stip. 6. The parties also stipulated that Respondent's Number 3 Mine produced 1,789,927 tons of coal and had 655,991 hours worked in 2008, the year preceding that in which Citation Number 8236517 was issued. Stip. 5. Finally, the regulations promulgated by MSHA provide for a "10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector." 30 C.F.R. § 100.3(f). The Secretary found that Respondent's agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the 10% reduction in the proposed penalty amount. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, the undersigned finds that the appropriate penalty to assess for the violation charged in Citation Number 8236515 to be \$2,150. Further, this Citation shall be modified to moderate negligence.

VI. ORDER

It is hereby **ORDERED** as follows:

1. Citation Number 8231582 is to be modified to low negligence, injury unlikely, and non-S&S. Respondent shall pay a penalty of \$250.
2. Citation number 8231583 is vacated in all respects.
3. Citation number 8231586 is to be modified to injury unlikely and non-S&S. Respondent shall pay a penalty of \$400.
4. Citation number 8236506 is to be modified to high negligence, injury unlikely, and non-S&S. Respondent shall pay a penalty of \$3,750.
5. Citation number 8236514 is to be modified to injury unlikely and non-S&S. Respondent shall pay a penalty of \$200.
6. Citation number 8236515 is to be modified to moderate negligence. Respondent shall pay a penalty of \$2,150.
7. Respondent shall pay the aforementioned penalty amounts totaling \$6,750 within 30 days of the date of this Order.¹³ Upon receipt of payment, the Citations are **DISMISSED**.

/s/ Susan L. Biro
Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

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¹³ Payment shall be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket and A.C. Numbers.